No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

76-778

NATIONAL CLASSIFICATION COMMITTEE,
*Appellant,*

v.

UNITED STATES OF AMERICA,
*Appellee.*

**On Appeal from the United States District Court for the District of Columbia**

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

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Appellant National Classification Committee[1] appeals from the judgment of the United States District Court for the District of Columbia suspending and re-

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[1] The National Classification Committee is an autonomous standing committee of the National Motor Freight Traffic Association, Inc., a non-profit membership corporation having its offices in Washington, D.C. Pursuant to an agreement approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, the National Classification Committee is the agency by which some 4,000 motor common carriers of property operating in interstate and foreign commerce

manding an order of the Interstate Commerce Commission which found just and reasonable an increase in the less-than-truckload rating applicable to the nationwide transportation of automobiles.

## OPINIONS BELOW

The opinion of the District Court is reported at 417 F. Supp. 851 (Advance Sheets) and is reproduced in Appendix A. The decision of the Interstate Commerce Commission is not reported and is reproduced in Appendix D.[2]

## JURISDICTION

The action below was instituted pursuant to 28 U.S.C. §§ 1336, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission entered August 15, 1974, and served August 19, 1974, in a proceeding styled Investigation and Suspension Docket No. M-24488, *Classification Ratings on Passenger Automobiles, Nationwide.* The judgment of the District Court was entered on July 14, 1976 (Appendix B).



On July 26, 1976, the Commission and Intervenor Defendant National Classification Committee moved the District Court to reconsider, rehear and clarify its opinion which requests were denied by order entered September 13, 1976 (Appendix C). Appellant's notice of appeal was filed in the District Court on September 9, 1976 (Appendix F). By order entered October 29, 1976, in No. A-353, this Court extended to December 8, 1976, the time for docketing this appeal.

The jurisdiction of this Court to review the final judgment of the District Court on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *American Commercial Lines* v. *Louisville & N.R. Co.,* 392 U.S. 571 (1968); *United States* v. *Dixie Highway Express, Inc.,* 389 U.S. 409 (1967); *American Trucking Assoc.* v. *A.T. & S.F.R. Co.,* 387 U.S. 397 (1967).

## STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001; Sections 1(6), 15a(2), 216(b), 216(i), 307(f) and 406(d) of the Interstate Commerce Act, 49 U.S.C. §§ 1(6), 15a(2), 316(b), 316(i), 907(f) and 1006(d); and Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, are reproduced in Appendix G.

## QUESTIONS PRESENTED

The classification of property by common carriers is the grouping of commodities into classes, with those commodities in the same class paying the same freight

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under certificates of public convenience and necessity issued by the Interstate Commerce Commission collectively discharge their duty under Section 216(b) of the Act, 49 U.S.C. § 316(b), to establish, observe, and enforce just, reasonable and otherwise lawful classifications of property for ratemaking purposes and just and reasonable regulations, and practices relating thereto. To that end it initiates and participates in proceedings before the Interstate Commerce Commission, other Federal and State regulatory agencies and Federal Courts involving the lawfulness of the rates, classifications, rules, regulations and practices of carriers rendering transportation in interstate and foreign commerce.

[2] Appendix D is the decision of an Administrative Law Judge. It became the decision and order of the Commission by order entered August 15, 1974, by Division 2 of the Commission (consisting of three Commissioners). Division 2's order is reproduced in Appendix E.

rates. The Commission, with the approval of this Court, requires that the assignment of a particular commodity to a particular class be made upon consideration of fifteen factors related to the characteristics of the commodity itself.

1. The first question presented is whether the District Court erred in requiring the Commission to give "proportionate" consideration to a sixteenth factor unrelated to the characteristics of the commodity itself, namely, the service carriers perform in the transportation of a particular commodity and the extent to which the revenues from the performance of that service exceed the costs of performing it.

2. The second question presented is whether the District Court exceeded the proper scope of judicial review of decisions of administrative agencies by re-weighing the evidence before the Commission and substituting its judgment for that of the Commission as to its probative value.

## STATEMENT

### The Agency Proceeding

Following nearly four years of administrative processing the Commission, on September 23, 1974, made final its order approving an increase in the less-than-truckload classification rating applied by some 4,000 motor carriers to the transportation of automobiles. The increased rating was opposed before the Commission by the United States Department of Defense (DOD).

The Commission's approval of an increased rating turned upon several correlative findings. It found that



the rating assigned to automobiles by motor carriers was copied from the railroads in 1936 and was never established to reflect the conditions encountered in transportation by motor carrier (App. D, p. D-3). It also found that the increase proposed was just and reasonable because the transportation characteristics of automobiles (density, handling, stowability, etc.) were not accurately reflected in the rail copied rating (App. D, p. D-4). Also, the Commission found that cost and revenue data relied upon by the DOD to show that the existing rating produced sufficient revenues to compensate motor carriers for the transportation of automobiles was "... entitled to little weight in proceedings involving class ratings for specific commodities." (App. D, p. D-9). Finally, the Commission found that the evidence presented, considered in its entirety, supported the increased rating.

### The District Court Proceeding

Dissatisfied with the Commission's decision, the Department of Justice on behalf of the DOD instituted an action in the District Court on February 13, 1975, to annul that decision. A three-judge Court was designated to hear and determine the merits of the action.

On September 29, 1975, the Department of Justice filed a Motion for Summary Judgment, to which the Commission and Intervenor Defendant National Classification Committee filed Cross Motions on January 23, 1976. The District Court heard oral arguments on the merits of the action on April 29, 1976. On July 14, 1976, the District Court denied the Motion and Cross-Motions and rendered its opinion suspending the Commission's final order and remanding the case for further action consistent with the Court's opinion.

The lower Court suspended and remanded the Commission's order primarily because the Commission failed to find that evidence adduced by the DOD presented ". . . a *prima facie* valid sampling of nationwide, representative [automobile] traffic" and the DOD's ". . . overall cost analysis was representative of the traffic subject to the classification increase and made a *prima facie* showing that the existing classification produced a fair return to carriers." (App. A, pp. A-7 and 8). Also, finding that the carriers presented "[h]ardly any itemized cost evidence . . .", the Court concluded that ". . . the rule is simply that cost and revenue data cannot be denied proportionate consideration when a substantial issue of cost and revenue is raised" (App. A, pp. A-9 and 11) in a Commission classification proceeding.

## THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case will have a major effect upon motor common carriers who are relied upon to transport our Nation's commerce. The general public will also feel its serious impact since the goods they consume will no longer be classified for transportation purposes according to long-standing characteristics the lower Court has found deficient.

Since the regulation of motor carriers began over 40 years ago, and of railroads many years before that, these public carriers have been required ". . . to establish, observe, and enforce just and reasonable . . . classifications . . ."[3] of the property they are authorized

[3] Sections 1(6) and 216(b) of the Interstate Commerce Act, 49 U.S.C. §§ 1(6) and 316(b). What is considered "just and reasonable" has led the Commission to conclude that these words



and required to transport. The process of actually classifying commodities involves the carriers' and, in contested cases before the Commission, the Commission's evaluation of what are commonly referred to as the "transportation characteristics" of commodities as they are tendered to carriers for transportation. This Court has described that process as ". . . grouping—the associating in a designated list, commodities, which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates." *Director General of Railroads* v. *Viscose Co.*, 254 U.S. 498, 503 (1921). This Court has also acknowledged that the characteristics considered when determining the classification to which a commodity should be assigned are:

1. Shipping weight per cubic foot.
2. Liability to damage.
3. Liability to damage other commodities with which it is transported.
4. Perishability.

". . . imply the application of good judgment and fairness, of common sense and a sense of justice to the facts of record. They ". . . are not fixed unalterable mathematical terms." *Acme Peat Products* v. *Akron, C. & Y. R. Co.*, 277 I.C.C. 641, 645-646 (1950). This Court had held that reasonableness is a question of fact for the Commission, and its findings will not be disturbed by the Courts unless it is shown that clear and unmistakable error has been committed. *Illinois Central R. Co.* v. *Interstate Commerce Commission*, 206 U.S. 441 (1907). See also *Illinois Central R. Co.* v. *United States*, 263 F. Supp. 421, 430 (N.D.Ill. 1966), aff'd 385 U.S. 457 (1967); *Minneapolis & St. Louis Railway* v. *United States*, 361 U.S. 173 (1959).

5. Liability to spontaneous combustion or explosion.
6. Susceptibility to theft.
7. Value per pound in comparison with other articles.
8. Ease or difficulty in loading or unloading.
9. Stowability.
10. Excessive weight.
11. Excessive length.
12. Care or attention necessary in loading and transporting.
13. Trade conditions.
14. Value of service.
15. Competition with other commodities transported.

*All States Freight, Inc.* v. *New York, N.H. & H.R. Co.*, 379 U.S. 343, 345 (1964).

Conspicuous by its absence from this list is the lower Court's 16th characteristic—cost and revenue data designed to show whether an existing classification rating produces a fair revenue return to carriers. No such requirement has been previously set because it is an impossible task to measure the reasonableness of classifications by a standard that is foreign to classification making and has only been employed when establishing and measuring the reasonableness of carrier rates. The fact that a clear distinction exists between the process of establishing reasonable classifications of property and the process of establishing reasonable rates is firmly implanted in the law. This is so because, as the Commission has held, ". . . the classification pub-



lication and the class tariff [containing rates and charges], although complementary, serve entirely different purposes." *General Increase—Eastern Central Territory,* 316 I.C.C. 467, 483 (1962). The class tariff ". . . reflects the characteristics, not of the commodity, but of the haul; that is, it establishes a relationship between localities based upon weight and distance." *Id.* For this reason, ". . . [c]lassifications and rates and revenues should be kept entirely separate." *Western Classification Case,* 25 I.C.C. 442, 452-453 (1912).[4]

Unless corrected by this Court, the lower Court's creation of a 16th classification characteristic will require that a nationwide classification of commodities mantained by some 4,000 motor common carriers must endeavor to reflect the billions of combinations of carrier costs, shipment weights and transportation distances involved in the movement of our Nation's commerce. This is an impossible task beyond the realm of lawful classification making.

[4] Commodities have traditionally been classified according to the 15 characteristics referred to and assigned any one of approximately 30 ratings for ratemaking purposes. *All States Freight, Inc., supra,* at 345. Commodities that have the same or very similar characteristics are assigned the same rating. Differences in ratings assigned to commodities reflect differences in transportation characteristics. The particular purpose served by this process, which was the overriding purpose of the Interstate Commerce Act, is the prevention of unjust discrimination among persons, places and descriptions of traffic. To quote this Court: "The principal evil at which the Interstate Commerce Act . . . was aimed was discrimination in its various manifestations." *State of New York* v. *U. S.*, 331 U.S. 284, 296 (1947). In that case the Court affirmed the Commission's decision in *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945), in which the Commission, to eliminate discrimination, required the railroads to establish a uniform classification throughout the United States.

## I

The new classification characteristic established by the District Court finds its authority, according to the Court, in Section 216(i) of the Interstate Commerce Act (49 U.S.C. § 316(i)) which requires that:

> "In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

The Court emphasizes the phrase "need of revenues" (App. A, p. A-5) to ground its conclusion that cost and revenue data must be given "proportionate consideration" in Commission classification proceedings. The Court also acknowledges, however, that classification proceedings have historically dealt with the characteristics of commodities and have given virtually no consideration to cost and revenue data. Nonetheless, the Court turns to two Commission proceedings [5] to support its conclusion that such data must be considered and may be determinative of the result reached in classification proceedings. In so doing the Court commits three serious errors, viz: (1) it fails to recognize that the Commission did, in fact, receive in evidence and carefully consider cost evidence adduced by both DOD and carriers; (2) it extends the holdings of *Blankets* and *Density* beyond their reasonable limits by concluding that cost and revenue data may determine the final result in a classification proceeding; and, finally, (3) it misconstrues Section 216(i) to require the Commission to consider carrier revenue needs when evaluating proposals for increases in ratings applicable to individual commodities. We will consider these errors *seriatim*.

[5] *Increased Classification Ratings on Blankets*, 341 I.C.C. 760, 766-767 (1972); *Classification Ratings Based on Density*, 337 I.C.C. 784, 789 (1970).



First, the Commission's decision clearly indicates that careful consideration was given to the cost evidence adduced by DOD and carriers. The lower Court's opinion creates the erroneous impression that this evidence was rejected out of hand. To the contrary, the Commission's decision makes it clear that the cost data was received in evidence, analyzed, criticized and found to be ". . . entitled to little weight in proceedings involving class ratings for specific commodities." (App. D, p. D-9).

Secondly, the Commission's decisions in *Blankets* and *Density* are not at odds with the *Automobiles* decision. Neither case supports the proposition that cost and revenue data must receive consideration "proportionate" to that given the fifteen traditional classification characteristics. The clear holdings of each case reflect the narrow circumstances in which the Commission has considered cost or revenue data relevant in classification proceedings and undercut the lower Court's reliance upon each.

At issue in *Density* was a general rule that proposed to re-classify and assign increased ratings to countless

numbers of commodities that move in interstate commerce. The Commission received in evidence shipper cost and revenue data designed to show the impact such a rule would have upon traffic generally. Ruling upon the carriers' objection to the receipt of such evidence, the Commission concluded that "Cases cited by the respondents are in agreement that in the establishment of class ratings for specific commodities, rate and cost data are not probative factors for use to support the proposed rating." 337 I.C.C. at 789. Here, the lower Court's opinion and the Commission's *Automobiles* decision are concerned with ". . . the mere reclassification of one commodity" (337 I.C.C. at 789) and not the multitude of commodities being reclassified in *Density*. *Automobiles* is, therefore, readily distinguishable from *Density*.

The facts in *Blankets* are even more narrow. There the Commission was concerned with the reclassification of a single commodity and received in evidence cost and revenue data designed by protesting shippers to show the impact of a proposed rating increase. The "controlling reason" (341 I.C.C. at 767) given by the Commission for consideration of that data was found in the Commission's obligation to determine if the increase was in violation of the Wage and Price Stabilization Program. The rating proposed was not shown to conform to the standards of that program and was disapproved; however, the lower Court ignores the fact that the Commission also found the increased rating just and reasonable under the standards applied by the Interstate Commerce Act. Those are the same standards as were applied by the Commission in *Automobiles,* viz., density, value, liability to damage, etc., classification characteristics traditionally considered in these cases.



Thirdly, the lower Court's construction that Section 216(i) of the Interstate Commerce Act ". . . appears to mandate consideration of cost and revenue data in both rate and classification proceedings . . ." is clearly erroneous. A more accurate construction has been provided by the Commission and courts indicating this provision exists for much broader, general policy considerations than that envisioned by the lower Court.

Section 216(i) is commonly referred to as the "rule of ratemaking." Identical or nearly identical sections are contained in each part of the Interstate Commerce Act regulating the interstate transportation performed by railroads, water carriers, freight forwarders and motor carriers.[6] The history surrounding the several rules of ratemaking indicate they were intended by Congress to serve, together with the Declaration of the National Transportation Policy,[7] as broad policy declarations to the Commission when it must deal with the general revenue needs of common carriers. Congress intends that these rules will promote a sound and healthy system of transportation serving the public at the lowest rates compatible with the furnishing of service, in return for which common carriers will receive a reasonable return on their investments. *King* v. *United States,* 344 U.S. 254, 263-264 (1953); *State of Florida* v. *United States,* 292 U.S. 1, 6-8 (1934); *Increases in Freight Rates and Charges—1973,* 351 I.C.C. 414, 418

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[6] The Part I provision regulating railroads is Section 15a(2) (49 U.S.C. § 15a(2)); the Part III provision regulating water carriers is Section 307(f) (49 U.S.C. § 907(f)); the Part IV provision regulating freight forwarders is Section 406(d) (49 U.S.C. § 1006(d)); the Part II provision regulating motor carriers is Section 216(i) (49 U.S.C. § 316(i)).

[7] 49 U.S.C. preceding §§ 1, 301, 901 and 1001.

(1975); *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589, 733-734 (1973); 46th Annual Report of the Interstate Commerce Commission to Congress, 1932, p. 18. In *King* v. *United States, supra,* this Court held that "Section 15a(2) [the railroads' counterpart of Section 216(i)] of the Interstate Commerce Act and the National Transportation Policy of 1940 reflect this broad concept of the unity of the Nation's transportation system. They direct the Commission to consider, among other things, the need, in the public interest, of adequate and efficient railway transportation service and the need of revenues sufficient to sustain such service." 344 U.S. at 263-264. The history surrounding Section 216(i) conforms to this Court's view. It does not conform to the lower Court's view that Section 216(i) is the standard against which an increased classification rating for a single commodity must be measured.

## II

This Court's intervention in this case is also required to resolve a substantial question respecting the proper scope of judicial review. It is settled that a reviewing court must ". . . consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 416 (1971). The agency must articulate a ". . . rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962).



Here the lower Court dissects the agency's decision with the opening salvo that "[J]udicial deference to expertise is not boundless. . . ." (App. A, p. A-4). From that point the Court proceeds to re-weigh the evidence, substituting its judgment for that of the Commission. For example:

1. The Court concludes that a study determined by the Commission to ". . . have little probative value . . ." (App. D, p. D-8) was ". . . a *prima facie* valid sampling of nationwide, representative traffic" (App. A, p. A-8).

2. Contrary to the Commission's conclusion that the classification increase in issue would apply to ". . . *all* passenger motor vehicles, NOI, and is not confined to the military vehicles which predominate in . . . [DOD's] computations" (emphasis theirs) (App. D, p. D-12), the Court concludes that the ". . . only evidence in the record indicated that a substantial number, if not almost all, LTL passenger car shipments are by the Government. . . ." (App. A, p. A-8).

3. Although the Commission found that cost studies of the type produced by DOD have ". . . little probative value in determining the reasonableness of the proposed *nationwide* change in ratings" (emphasis theirs) (App. D, p. D-8) and are ". . . entitled to little weight in proceedings involving class ratings for specific commodities" (App. D, p. D-9), the lower Court views the same study as ". . . representative of the traffic subject to the classification increase and made a *prima facie* showing that the existing classification produced a fair return to carriers." (App. A, p. A-8).

Having virtually ignored the Commission's decision on the sole basis of costs and revenues, the lower Court

elects to also disregard the only evidence the Commission considered persuasive of a needed change in the classification rating in issue by concluding that density calculations are not to be given a ". . . talismanic effect in classification proceedings. . . ." (App. A, p. A-10). The Commission thought otherwise, concluding that "[t]he most persuasive evidence of record pertains to the low density characteristics of uncrated automobiles." (App. D, p. D-12). There is ample precedent for the Commission's conclusion since density is regarded as the dominant transportation characteristic considered in the formulation of just and reasonable classifications for motor common carriers. *Increased Classification Ratings on Blankets, supra,* 341 I.C.C. at 765; *Classification Ratings Based on Density, supra,* 337 I.C.C. at 805; *Incandescent Electric Lamps or Bulbs,* 44 M.C.C. 501, 507, 512 (1945).

In short, the District Court re-weighed the testimony received in the Commission proceeding. In so doing it went beyond its judicial function by substituting its judgment for that of the Commission. *Ralston Purina Co.* v. *Louisville & N.R. Co.,* —— U.S. ——, 48 L.Ed.2d 781, 96 S. Ct. —— (1976); *Alton R. Co.* v. *United States,* 315 U.S. 15, 23-24 (1942); *Illinois C.R. Co.* v. *Norfolk & W.R. Co.,* 385 U.S. 57, 69 (1966).



## CONCLUSION

The questions presented by this appeal are substantial and of public importance. Appellant urges that jurisdiction be noted, that the judgment of the District Court be reversed, and that the case be remanded to that Court with instructions to affirm the Commission.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Thomas M. Auchincloss, Jr., counsel for appellant herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 8th day of December, 1976, I served copies of the foregoing document on the parties hereto, postage prepaid by first class mail, as follows:

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# APPENDIX A

# APPENDIX A

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*,

and

NATIONAL CLASSIFICATION COMMITTEE, *Intervenor*.

Civ. A. No. 75-213.

July 14, 1976

As Amended Sept. 17, 1976

Before MacKINNON, *Circuit Judge*, and SMITH and ROBINSON, *District Judges*.

## Opinion

PER CURIAM.

In this action, the Court is requested to set aside, annul, or suspend a final reclassification order of the Interstate Commerce Commission (ICC), pursuant to 28 U.S.C. §§ 1336(a), 2321-2325 (1970).[1] The order was issued on August 15, 1974 in Investigation and Suspension Docket No. M-24488, *Classification Ratings on Passenger Automobiles, Nationwide*, culminating almost four years of administrative proceedings. Its effect is to increase by some 60% the cost of shipping an automobile by motor freight. Plaintiff herein is the United States, acting on behalf of the Department of Defense. Defendants are the ICC and an intervenor representing the position of the motor car-

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[1] Congress recently enacted new review procedures for ICC orders and decisions, superseding the above provisions. *See* Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917.

riers, the National Classification Committee (NCC).[2] The matter is before the Court on Cross Motions for Summary Judgment.

## I. The System of Classification and Rates

Classification is the process of assigning numerical ratings to commodities in an attempt to portray their transportation characteristics. The ratings are expressed as percentages of certain established first class rates. Various factors relating to a commodity are considered, such as density, value, susceptibility to damage, difficulty or care involved in handling, stowability, value of service, and trade competitive conditions.[3] The cost of shipping a particular article may be determined from its weight, its classification rating and the existing tariff or rate. Thus, although they are distinct elements, both classification and rate play a part in establishing the ultimate cost of shipping a commodity.

Since 1936, when the motor carrier industry adopted its classification system wholesale from railroad provisions, the classification applicable to passenger automobiles has remained unchanged.[4] In the late 1960's, as a revenue-producing measure, certain motor carrier tariff associations permitted classification exceptions for automobiles which resulted in higher charges than under published ratings. This prompted a series of claims and legal actions for reparations against individual motor carriers. The carriers

[2] As explained in the NCC's Motion for Leave to Intervene as a Party Defendant, at 1-2, filed March 14, 1975: "The National Classification Committee is an autonomous standing committee of the National Motor Freight Traffic Association, Inc., a non-profit membership corporation. . . . Pursuant to an agreement approved by the Interstate Commerce Commission under Section 5a of the Interstate Commerce Act, 49 U.S.C. Section 5b, the National Classification Committee is the agency by which some 4,000 motor common carriers of property operating in interstate and foreign commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission collectively discharge their duty under Section 216(b) of the Act, 49 U.S.C. Section 316(b), to establish, maintain and publish just, reasonable and otherwise lawful classifications of property for rate making purposes and just and reasonable regulations, rules and practices relating thereto. To that end it initiates and participates in proceedings before the Interstate Commerce Commission, other Federal and State regulatory agencies and the Federal Courts involving the lawfulness of the rates, classifications, rules, regulations and practices of carriers rendering transportation and services in connection with transportation in interstate and foreign commerce."

[3] In *All States Freight, Inc.* v. *New York, New Haven & Hartford R.R.*, 379 U.S. 343, 85 S.Ct. 419, 13 L.Ed.2d 324 (1964), the Supreme Court noted: "The characteristics of a commodity which are generally considered in determining the classification to which it should be assigned are: 1. Shipping weight per cubic foot. 2. Liability to damage. 3. Liability to damage other commodities with which it is transported. 4. Perishability. 5. Liability to spontaneous combustion or explosion. 6. Susceptibility to theft. 7. Value per pound in comparison with other articles. 8. Ease or difficulty in loading or unloading. 9. Stowability. 10. Excessive weight. 11. Excessive length. 12. Care or attention necessary in loading and transporting. 13. Trade conditions. 14. Value of service. 15. Competition with other commodities transported." *Id.* at 345 n. 2, 85 S.Ct. at 421. (citing *Motor Carrier Rates in New England*, 47 M.C.C. 657, 660-61 (1948)). *See also Director General* v. *Viscose Co.*, 254 U.S. 498, 503, 41 S.Ct. 151, 65 L.Ed. 372 (1921); *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508-09 (1945); *cf. New York* v. *United States*, 331 U.S. 284, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947).

A recent case has indicated, "The first twelve classification characteristics [enumerated in *All States Freight, supra*] are related to cost and serve to make a fairer distribution of the total burden. The last three relate to the ability of the article to bear the charges." *Nat'l Small Shipments Traffic Conf.* v. *United States*, 321 F.Supp. 500, 511 (S.D.N.Y. 1970), on remand, 350 I.C.C. 586 (1975).

[4] Memorandum of the ICC in Support of its Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, at 9, filed January 22, 1976.

thereupon petitioned the National Classification Board, which, after investigation and notice, proposed an increase in classification from 150 to 250 for less-than-truckload (LTL) shipments of passenger automobiles.[5] The proposed schedules, however, were suspended following a protest by the Department of Defense, a major shipper of jeeps. military vehicles, and decedents' automobiles. *See* 37 U.S.C. § 554(a)(b) (statute as amended in 1965 to permit shipment of automobiles of deceased Vietnam servicemen at public expense). After a lengthy administrative proceeding, the increase eventually was approved by the ICC in the order here contested.

Plaintiff's primary contention here is that the ICC decision failed to consider adequately cost evidence which would have shown the increase in classification to be economically unreasonable. Defendants argue that cost data is not entitled to probative weight in classification proceedings, and that the ICC's determination relied upon specific automobile characteristics, including handling problems, stowability, susceptibility to damage, and density. While the Court's administrative review function here, under 5 U.S.C. § 706, is a limited one, it is also true that, "[J]udicial deference to expertise is not boundless; and expertise is not sufficient in itself to sustain a decision. The order must be supported by substantial evidence and must be made within the statutory limits placed on the Commission's powers by Congress." *Eastern Central Motor Carriers Ass'n* v. *United States,* 239 F.Supp. 591, 594 (D.D.C. 1965); *cf. Ayrshire Colleries Corp.* v. *United States,* 335 U.S. 573, 592-93, 69 S.Ct. 278, 93 L.Ed. 243 (1949). The Court therefore must analyze precisely the ICC's statutory duties, the precedents on introduction of cost data in classification proceedings, and the evidence in the record supporting the agency's decision.

[5] *See generally National Classification Committee—Agreement,* 299 I.C.C. 519 (1956) (authority and function of National Classification Board and of National Classification Committee). The Board also proposed a 3500 pound minimum weight for LTL shipments and an increase in classification of truckload shipments from 100 to 125. The ICC found these proposals unsupported by the evidence. No appeal has been taken from these rulings.



## II. The Role of Cost and Revenue Data in Classification

49 U.S.C. § 316(i) sets forth the ICC's general authority concerning rate and classification matters:

> "In the exercise of its power, to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and *classifications,* regulations and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the *lowest cost* consistent with the furnishing of such service; and to the *need of revenues* sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service." (Emphasis added).

While the statute on its face appears to mandate consideration of cost and revenue data in both rate and classification proceedings, the ICC has not required cost information or cost justification when evaluating individual proposals for classification increases. Classification proceedings have historically dealt primarily with the qualities and characteristics of commodities, and have accorded little

weight to cost and revenue matters. There is support for this approach in the statute's legislative history.[6]

However, the consideration of cost and revenue data *has* been permitted in certain classification proceedings. As stated in *Classification Ratings Based on Density,* 337 I.C.C. 784, 789 (1970), "[R]ate and cost information was offered by the protestants challenging the justness and reasonableness of the proposed new rule to show its consequences in terms of impact on traffic and shippers, and to question the proposition espoused by the respondents that the rule was needed to make the light and bulky traffic pay its share of the transportation burden." The ICC found the information to have been properly admitted. *Accord, Increased Classification Ratings on Blankets,* 341 I.C.C. 760, 766-67 (1972). *See also* note 3, *supra.*

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[6] 49 U.S.C. § 316(i), as amended, is patterned upon 49 U.S.C. § 15a(2). *See* H.R.Rep. No. 2832, 76th Cong., 3d Sess. 79 (1940) (rule of ratemaking standardized for motor carriers); *see also* 49 U.S.C. § 15a(1). 49 U.S.C. § 15a(2) replaced a complex method of annually valuating railroad property in order to compute the permissible fair rate of return. *Compare* Transportation Act of 1920, § 422, 41 Stat. 456, 488. The statutory factors listed are intentionally non-specific and allow the ICC considerable latitude in prescribing just and reasonable rates. *See* H.R.Rep. No. 193, 73d Cong., 1st Sess. 30 (1933); 77 Cong.Rec. 4259 (1933) (remarks of Sen. Dill, floor manager of measure). As part of the Emergency Railroad Transportation Act of 1933, the provision was mainly an attempt to generate more adequate revenues for the railroads by removing rigid rate barriers and an unworkable recapture scheme. *Cf. United States* v. *Chesapeake & Ohio Ry.,* — U.S. —, — · —, 96 S.Ct. 2318, 49 L.Ed.2d 14, 44 U.S.L.W. 4869, 4877-78 (1976) (Stevens, J., dissenting). The reports and floor debate are silent concerning the procedures and criteria to be used in establishing just classifications—traditionally developed without any cost considerations.



## III. The Role of Cost and Revenue Data in the Present Case

In the present action, in attempting to show that passenger vehicles were paying their fair share under the existing classification, plaintiff offered into evidence a Government Accounting Office (GAO) audit covering 219 Military LTL shipments of passenger automobiles, Ex. 6 in Administrative Record, and the average variable costs and revenue needs for such shipments, later revised to reflect ICC density adjustment ratios. Exs. 16, 18. The audit included shipments between points in Transcontinental Territory, South-Central Territory, and Southwestern to Eastern-Central Territory. Plaintiff's analysis concluded that the proposed classification increase would result in revenues far in excess of those considered necessary by the ICC to produce a reasonable return for carriers. Defendant NCC disclaimed the importance of cost data in classification matters, challenged plaintiff's records and calculations in cross-examination, and later presented evidence to rebut the accuracy of plaintiff's density computations. The NCC, however, submitted no independent cost studies of its own.[7] The hearing examiner admitted plaintiff's exhibits into evidence but criticized their lack of typicality and currency; she held that, in any event, such cost considerations were entitled to little weight in classification. Doc. O at 7-8. Defendant NCC's cost data was faulted for its improper methodology. Doc. O, App. C.

Plaintiff's cost evidence, of course, was not entitled to controlling weight in the classification proceeding. Nevertheless, we find that the minimal significance attached to this data by the ICC was erroneous. Contrary to the hearing examiner's findings, which were affirmed by the ICC,

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[7] Doc. J at 298-99; Ex. 20 (verified statement of John C. McWilliams). Defendant NCC's position throughout the administrative proceeding was that cost considerations were totally irrelevant in classification proceedings. *See, e.g.,* Doc. B at 9-10; Doc. I at 279-80; Doc. J at 357-58; Doc. L at 46-47; Doc. Q at 36-39.

the GAO audit presents a *prima facie* valid sampling of nationwide, representative traffic. Over two-thirds of the shipments were between points in Transcontinental Territory or in territories having comparable costs. Since the only evidence in the record indicated that a substantial number, if not almost all, LTL passenger car shipments are by the Government,[8] commercial usage principles justified a survey of military vehicles in order to establish average distances, density, handling problems, interchanges, damage claims, and costs. *Cf. Rules to Govern the Assembling and Presenting of Cost Evidence,* 337 I.C.C. 298, 387 (1970). The cost-revenue data utilized in the audit was essentially contemporaneous with the shipments studied and could have been easily updated by the ICC when more current data became available—as subsequently recomputed by plaintiff. In short, plaintiff's overall cost analysis was representative of the traffic subject to the classification increase and made a *prima facie* showing that the existing classification produced a fair return to carriers.

Defendant NCC, as noted, was unable to rebut plaintiff's showing.[9] Whether viewed as non-conformity with 49

[8] Ex. 1, App. A (Lucore Statement).

[9] This was clearly not for lack of information or resources. NCC has access to carriers' freight records reflecting routes, loads, spotting instances, actual handling costs, interchange expenses, and revenue figures. Such general information *must* be introduced by carriers in ratemaking proceedings. The ICC's Section of Cost Finding has developed Highway Forms A and B to assist in determining freight costs and has published numerous reports and tables on cost computations. Moreover, the carriers have their own cost research arm, which was called upon to justify the increases herein under the economic stabilization program. With the termination of the program, the need for such cost justification became moot. *Cf. Carpenters 46 County Conf. Bd.* v. *CISC,* Em.App., 522 F.2d 637, 640 (1975), cert. denied, — U.S. —, 96 S.Ct. 1724, 48 L.Ed.2d 194 (1976); *United States* v. *California,* Em.App., 504 F.2d 750 (1974), cert. denied, 421 U.S. 1015, 95 S.Ct. 2423, 44 L.Ed.2d 684 (1975).



U.S.C. 316(g)'s burden of proof requirement or as a failure to go forward with more complete evidence within the NCC's exclusive control, this could not be excused by the ICC once cost matters were placed in issue. *Cf. ICC* v. *New York, New Haven & Hartford R.R.,* 372 U.S. 744, 760 n. 12, 83 S.Ct. 1038, 10 L.Ed.2d 108 (1963). Nor can the various transportation characteristics of passenger vehicles be accepted as *per se* indicators of cost without a more precise demonstration of *what* costs each characteristic entails. *Cf. Nat'l Small Shipments Traffic Conf.* v. *United States, supra,* 321 F.Supp. at 511. Hardly any itemized cost evidence from the carriers was presented to the ICC or in the reparations cases. Defendant NCC appears instead to have assumed that the problems involved in handling, stowing, and hauling an unusual commodity such as uncrated passenger vehicles automatically justified an increase in revenue to the carriers. These factors, however, were not of recent origin; they were the very same elements that supported the existing classification.

On the other hand, plaintiff, in addition to introducing cost studies, contended before the ICC that military personnel, and not the carriers, routinely load and secure vehicles for transport onto freight vans; that the consignor or consignee under Government regulation (49 C.F.R. §§ 173.1, .120, .250) and carriers' rule (Item 568) must share responsibility for loading and unloading automobiles; that cross-dock handling procedures in interchanges are not overly complicated; that damage claims are not excessive; and that extraordinary pickup and delivery problems, such as shipping from or to private residences, may be compensated through separate tariff charges. These unrefuted assertions substantially undercut the carriers' claims that physical transportation characteristics implicitly demonstrate the costs associated with handling an article. Costs and values cannot be evaluated unless the particular quali-

ties or problems inherent in a commodity are quantified in some explicit, demonstrable manner.[10]

The essential point is that classification is not to be an artifice or an "end around" method of increasing revenue —without supporting cost evidence. *Cf. Western Classification Case,* 25 I.C.C. 442, 453 (1912) (classification not an instrumentality for revising rates and charges). As was observed over 60 years ago during debate on legislation providing the ICC with specific classification authority, "[C]lassification of freight is just as important as rates, because by moving a particular article from one class to another you affect the rates." 45 Cong. Rec. 4578 (1910) (statement of Rep. Mann). Congressman Russell further explained this viewpoint:

> "[T]he shipper can be extorted from; he can be made to pay an unjust rate just as well through classification as he can through the fixing of a rate. The carriers can put an article in one classification, subject to a given rate, and if the Interstate Commerce Commission sees fit to declare that rate unreasonable, and reduce it, declaring what shall be a reasonable rate to take its place, the carrying corporation can obtain the same benefit and put the shipper under the same disadvantage by simply changing the classification of the article." *Id.* at 5142, quoted in *All States Freight, supra,* 379 U.S. at 350, 85 S.Ct. 419.

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[10] Nor are density calculations to be given a talismanic effect in classification proceedings. *See Incandescent Electric Lamps or Bulbs,* 47 M.C.C. 601, 606-08 (1947); *Classification Ratings Based on Density, supra,* 337 I.C.C. at 799. In classification, "None of the principles or elements [i.e., transportation characteristics] should be controlling, but all that are relevant should be considered." *Class Rate Investigation, 1939, supra,* 262 I.C.C. at 508.



## Conclusion

To prevent arbitrary or unreasonable classifications, the ICC as well as the National Classification Board and the National Classification Committee cannot ignore cost and revenue data when a claim is raised, with substantiation, that an existing classification suffices to assure a fair, compensatory return to carriers. Cost and revenue data is one of the factors to receive rational, albeit only proportional, consideration among the various classification factors. This should be especially true when it appears that the carrier by a change in classification is attempting thereby to increase its revenue.

This should not impose an undue hardship upon carriers or upon the ICC. As observed at note 9, *supra,* cost information is to some extent readily available. Nor does this requirement remove or blur the distinction between classification and rate making. In classification proceedings, the rule is simply that cost and revenue data cannot be denied proportionate consideration when a substantial issue of cost and revenue is raised.

Finding a failure to evaluate adequately cost and revenue data, the Court remands this matter to the ICC for the development and consideration of cost evidence relating to the classification increase. The agency's order of August 15, 1974 is suspended pending further action consistent with this opinion.

Judgment Accordingly.

# APPENDIX B

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-213

UNITED STATES OF AMERICA, *Plaintiff*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Defendants*

and

NATIONAL CLASSIFICATION COMMITTEE, *Intervenor*

**Order**

(Filed July 14, 1976)

Upon consideration of plaintiff's Motion for Summary Judgment, defendant Interstate Commerce Commission's Cross Motion for Summary Judgment, intervenor-defendant National Classification Committee's Cross Motion for Summary Judgment, and the memoranda of points and authorities in support thereof and in opposition thereto; oral argument of counsel having been heard; and for the reasons set forth in the accompanying Opinion, it is by the Court this 14th day of July 1976

ORDERED that plaintiff's Motion for Summary Judgment be, and the same hereby is, denied; and it is further

ORDERED that defendant Interstate Commerce Commission's Cross Motion for Summary Judgment be, and the same hereby is, denied; and it is further

ORDERED that intervenor-defendant National Classification Committee's Cross Motion for Summary Judgment be, and the same hereby is, denied; and it is further

ORDERED that the order of defendant Interstate Commerce Commission in Investigation and Suspension Docket No. M-24488, *Classification Ratings on Passenger Automobiles,*

*Nationwide,* dated August 15, 1974, be, and the same hereby is, suspended; and it is further

ORDERED that the above-captioned case be, and the same hereby is, remanded to the Interstate Commerce Commission for further proceedings consistent with this Opinion and Order.

/s/ GEORGE E. MACKINNON
*United States Circuit Judge*

/s/ JOHN LEWIS SMITH, JR.
*United States District Judge*

/s/ AUBREY E. ROBINSON, JR.
*United States District Judge*

# APPENDIX C

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-213

UNITED STATES OF AMERICA, *Plaintiff*

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*

and

NATIONAL CLASSIFICATION COMMITTEE, *Intervenor-defendant*

### Order

Upon consideration of the Motions of defendant Interstate Commerce Commission and intervenor defendant National Classification Committee for Reconsideration, Rehearing and Clarification and Stay of Judgment, and plaintiff's response thereto, it is by the Court this 13 day of September 1976

ORDERED that the Motions of defendant Interstate Commerce Commission and intervenor defendant National Classification Committee for Reconsideration, Rehearing and Clarification and Stay of Judgment be, and the same hereby are, denied.

/s/ GEORGE E. MACKINNON
*United States Circuit Judge*

/s/ JOHN LEWIS SMITH, JR.
*United States District Judge*

/s/ AUBREY E. ROBINSON, JR.
*United States District Judge*

# APPENDIX D

# APPENDIX D

**Interstate Commerce Commission**

**Service Date**
**August 30, 1972**

**Investigation and Suspension Docket No. M-24488**

**Classification Ratings on Passenger Automobiles, Nationwide**

Decided

1. Proposed increased less-than-truckload rating on passenger automobiles found just and reasonable under Interstate Commerce Act but not shown to comply with economic stabilization program.
2. Proposed less-than-truckload minimum weight of 3,500 pounds and proposed increased truckload rating on passenger automobiles found not shown to be just and reasonable.
3. Schedules ordered cancelled without prejudice to the filing of additional evidence to show that proposal, to the extent otherwise found lawful, is in compliance with price stabilization criteria.

*Thomas M. Auchincloss, Jr.* for respondents and intervener in support of respondents.

*James E. Armstrong* for protestant.

REPORT AND ORDER
RECOMMENDED BY JANICE M. ROSENAK, HEARING EXAMINER[1]

By schedules filed to become effective November 30, 1970,[2] the National Motor Freight Traffic Association, Inc.,

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[1] The case was heard under special procedures by Hearing Examiner Henry A. Winters who later became unavailable to the Commission. Subsequently, by order dated July 7, 1972, the proceeding was assigned to this examiner for recommendation of an appropriate order accompanied by the reasons therefor.

[2] Item 190210-A Supplement 10 to National Motor Freight Classification A-11, MF-I.C.C. 13.

Agent, proposed to establish on behalf of carriers parties to the National Motor Freight Classification, respondents herein, increased less-than-truckload (LTL) and truckload (TL) ratings on passenger automobiles, NOI, including ambulances or hearses. Upon protest of the Department of Defense (Department), operation of the proposed schedules was suspended to and including June 29, 1971. Thereafter, respondents voluntarily postponed indefinitely the effective date of the schedules to permit the issuance of an examiner's report and recommended order. The National Classification Committee intervened in support of the respondents.

By order dated May 11, 1971, a previous order directing modified procedure was vacated and the matter placed under special procedures whereby the parties submitted verified statements of their witnesses prior to hearing. A hearing was subsequently held at Washington, D.C. for cross-examination of witnesses and for the receipt of other pertinent evidence. Evidence in support of the proposal was introduced by respondents and the National Classification Committee. Evidence in opposition was submitted by protestant. Briefs have been filed by the parties.

At present, the classification provides the following ratings on passenger automobiles, not otherwise indexed:

| Item No. | Commodity | Classes LTL | TL | MWF |
|---|---|---|---|---|
| | VEHICLES, MOTOR, subject to item 190100: | | | |
| | Automobiles, subject to item 190120: | | | |
| 190210 | Passenger, NOI, including Ambulances or Hearses | 150 | 100 | 10.2 |



Respondents propose to revise these ratings as set forth below:

| Item No. | Commodity | Classes LTL | TL | MWF |
|---|---|---|---|---|
| | VEHICLES, MOTOR, subject to item 190100: | | | |
| | Automobiles, subject to item 190120: | | | |
| 190210-A | Passenger, NOI, including Ambulances or Hearses, LTL, each subject to a minimum weight of 3500 pounds | 250 | 125 | 10.2 |

The present classification provisions applicable to passenger automobiles were taken from the railroad classification when the motor carrier industry adopted its first national classification in 1936. The ratings have not been changed since that time. According to respondents, the proposed ratings and minimum weight provision are necessary to reflect the specific transportation characteristics of the commodity. One of the principal reasons for the change is that various claims and legal actions have been instituted by the United States government against individual motor carriers for the transportation of passenger automobiles at exceptions ratings higher than the classification. In the absence of special or unusual circumstances, such exceptions ratings are *prima facie* unreasonable since classification ratings and the class rates governed thereby generally provide the highest rates and charges which a commodity should bear. Accordingly, respondents requested the National Classification Board to amend the classification rating. The proposal under consideration here is the result of consideration of the matter by the Board; its disposition was not appealed to the National Classification Committee.

On brief, both respondents and protestant renew their objections to certain rulings of the examiner with regard to the admissibility of evidence. These matters are disposed of in Appendix A.

As above indicated, the present ratings on passenger vehicles were adopted from the railroad classification without specific evaluation of the transportation characteristics of the commodity. The considered proposal is represented by respondents as an attempt to more accurately reflect the transportation characteristics of automobiles when handled by motor common carriers in general freight service.

As a general rule, passenger automobiles are transported by specialized automobile transporters whose equipment is custom-designed for that purpose. However, in emergency situations or to points where auto transporter service is not available, passenger automobiles are tendered to common carriers of general commodities for transportation in closed-van equipment.

It is respondents' position that the unfavorable transportation characteristics of the commodity, when handled in general freight service, justify the increased ratings and proposed minimum weight. Respondents' classification expert testified that passenger automobiles, uncrated, have extremely low density, high value, high susceptibility to damage, and present unusual handling and stowing problems.

The respondents introduced evidence that the average density of 77 models of automobiles of American manufacture is 3.6 pounds per cubic foot (based on the average length of 209 inches, average cubic foot of trailer space of 1,012, and an average weight of 3,652 pounds). Using the characteristics of 610 automobile models (American and foreign, as listed in the 1971 National Automobile Dealers' Association directors) respondents computed an average density of 3.43 pounds. The respondents point out that



class ratings similar to those proposed have frequently been approved on commodities with average densities of less than 4 pounds per cubic foot.

The proposed 3,500-pound LTL minimum weight purportedly reflects the average weight of all passenger vehicles. In support of this portion of the proposal, respondents refer to an average weight of 3,345 for the 610 models listed in the NADA directory. A somewhat higher figure was selected, according to respondents, because the NADA "shipping" weights do not include the weight of various options which may be part of the automobile when it is tendered to the carrier.

Automobiles are generally loaded in the front of the trailer. The passenger vehicle must be braced, blocked and firmly secured to prevent shifting in transit. This operation is rendered difficult by the fact that little space is available on either side of the vehicle. In many instances, carrier personnel are required to push the car into the trailer manually or by mechanical means since space limitations do not permit opening of the car door as necessary following drive-on operations. Because of susceptibility to damage, the space in the trailer above and on each side of the automobile cannot be utilized for other general cargo. Additionally, a full bulkhead must be erected in some instances to prevent shifting of other freight into the area occupied by the motor vehicle. While installation of dual decking systems would permit co-loading of other freight with passenger vehicles, the evidence indicates that the additional expense of such equipment would not be justified in view of the sporadic nature of LTL automobile movements.

Special procedures must be adopted in connection with pick-up and delivery of passenger automobiles. A line-haul vehicle cannot be utilized without special ramps or tracks for loading; either a pick-up and delivery unit must be dispatched or a company car with two drivers is utilized so that one can drive the vehicle to the origin terminal.

Similar problems exist in connection with delivery of the automobile. If a joint-line movement is involved, the carriers are faced with cross-dock handling problems due to the size and weight of passenger automobiles.

Automobile batteries must be disconnected to prevent short circuits, and the quantity of gasoline must be noted on all shipping documents. During the winter months, the cooling systems are drained if the antifreeze solution does not appear sufficient. Special care is required to insure that any visible damage is recorded on the bill of lading. (Individual owners carefully scrutinize the automobiles on arrival; a detailed condition record is therefore essential in connection with possible damage claims.) Despite these precautions and the special handling outlined above, respondents maintain that passenger automobiles are highly susceptible to damage when transported by motor carriers in other than specially-designed equipment.

The Department of Defense contends that no need has been shown for a change in the existing classification ratings. If pickup and delivery of passenger automobiles present "unusual problems requiring special procedures," it is protestant's position that the respondents are amply compensated by the separate tariff charges which are in effect for this service.[3] Protestant also introduced evidence showing that no pick-up or delivery costs would be involved in connection with most shipments of jeeps or other military vehicles moving from or to specified military bases. Under an audit program, the Department identified 219 LTL shipments of passenger automobiles which moved on exceptions ratings between late 1966 and

[3] Rocky Mountain Motor Tariff Bureau, Eastern Central Motor Carriers Association, Inc., and Central and Southern Motor Freight Tariff Association, for example, all published charges for pick-up or delivery at private residences. (Items 753, 560-12-A, and 722-D of RMMTB Tariff 100, MF-I.C.C. 198, ECMCA Tariff 49-F, MF-I.C.C. A-390 and C&SMFTA Tariff 127-A, MF-I.C.C. 408, respectively.)



June of 1970. The witness was unable to state how many additional automobile shipments were handled for the government during this same period. Of the shipments included in the audit, more than 50 percent moved from or to military bases at points where the loading or unloading is performed by government or contractor personnel rather than the carrier. On many of these shipments, government personnel also furnished the blocking and bracing materials and secured the vehicle to the trailer. For this reason, protestant urges that handling problems alone do not justify increased ratings.

In regard to stowability, protestant calls attention to evidence that some carriers topload freight on vehicles which have windshields folded down on the hoods. However, the movements referred to by protestant (shipments of a jeep from Avondale, Colo. to Fort Lewis, Wash. and an ambulance from Defense, Tex. to Fort Ord, Calif.) resulted in broken or cracked windshields. Thus, such evidence is hardly convincing as to the practicality of toploading other freight on passenger vehicles.

Based on the 219-shipment study of LTL shipments above discussed, the protestant constructed average costs per shipment for the principal territories involved in those movements: Transcontinental Territory, South-Central Territory, and Southwestern to Eastern Central Territory. These cost computations, described more fully in Appendix C, generally follow the procedures outlined in Statement No. 7-69, Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities—1968. Protestant then compared the costs developed for the various regions at the variable and "revenue need" level [4] with average revenues the carriers would

[4] This level is equivalent to fully distributed costs. While use of a fully allocated level was approved by the Commission in Docket No. 34013, *Rules to Govern the Assembling & Presenting of Cost Evidence,* 337 I.C.C. 298, the terms are sufficiently similar for the purposes used herein.

have received under the present and proposed classification basis. Since the hypothetical average revenues for these shipments exceed the costs developed by protestant, it is contended that no need has been shown for increased ratings. Such computations, however, have little probative value in determining the reasonableness of the proposed *nationwide* change in ratings. There is no showing as to the proportion of the total traffic, or even of government passenger vehicle shipments, moving in the territories for which costs were presented, nor does it appear that such regional average costs accurately reflect the unusual circumstances and characteristics of the considered automobile traffic. The record indicates, for example, that conditions surrounding the pickup and delivery of this commodity differ substantially from the normal pickup and delivery service for which unit costs are developed in Statement No. 7-69. Similarly, the regional average cost for interchange of cargo would in many instances understate the cost of handling the issue traffic. As testified by the director of traffic for one of the carrier respondents, almost an hour was needed merely to release and prepare an automobile shipment for unloading prior to interchange with a connecting carrier.

The examiner also notes that protestant's cost data does not reflect current cost levels; Statement No. 7-69 is based on 1966 regional studies adjusted to a 1968 level through the use of updating ratios separately applied to unit cost for each service (i.e., line-haul pickup and delivery, platform handling and billing and collecting). In protestant's cost-revenue exhibits, 1968 costs are compared with revenue figures based on averages of class rates, some of which were in effect at different periods as late as the middle of 1970. Since motor carrier general increases are reflected in the class rates, use of different base periods for costs and rates would tend to overstate the ratio of revenues to cost under both the present and proposed classification basis.



In view of these deficiencies, protestant's cost data will not be further discussed. Moreover, although the cost exhibits have been admitted into evidence, it should be pointed out that the Commission has generally held that cost considerations are entitled to little weight in proceedings involving class ratings for specific commodities. Compare *Classification Ratings Based on Density,* 337 I.C.C. 784. See also *Motor Carrier Rates in New England,* 44 M.C.C. 657, 660-661, for a listing of the characteristics to be considered in establishing classification ratings.

Finally, protestant disputes respondents' claim that repairs are a major factor in the transportation of passenger automobiles. Its survey of the 219-shipment study shows 28 instances where loss and damage notations were found on the bill of lading. However, eight of the bills were stamped in error on the basis of pre-existing damage, and no claims were filed. No claim was filed on another shipment, apparently because the amount involved was small. Of the remaining shipments, records could be located for only 13. The damage on those shipments amounted to $1,059.41, or an average of $81.39 per shipment. Extrapolating these figures for the other six shipments, protestant computes an average total damage factor on the 219 shipments of $7.06 per shipment. On this basis, the average loss and damage factor for those shipments would amount to approximately 1.89 percent of revenues under present ratings and only 0.89 percent of revenues under the proposal at issue. This figure appears understated, however, since there were 37 shipments in the study for which records were incomplete, and no determination could be made as to whether damage had occurred. Also, there is no indication that the damage figures are representative of passenger automobiles shipments in general. Protestant's witness was unable to satisfactorily explain the apparent discrepancy between the damage listed and the low cost of repairs. On this point, the witness stated he had no knowl-

edge as to the manner in which the government repairs or arranges for repairs to damaged vehicles.

Protestant alleges that the proposed minimum weight has not been justified. Respondents' figures demonstrate that the carriers would be assured of average shipments in excess of 3,300 pounds; the average weight of the 223 vehicles in protestant's study is 2,726 pounds. In either event, the motor carriers are guaranteed at least a ton of LTL freight without any minimum weight provision. Less than 40 of the more than 9,000 descriptions in the tariff presently carry LTL minimum weight or charges based on minimum pounds, and protestant points out that most of these provisions were established prior to adoption of the National Motor Freight Classification in 1939. Protestant further urges that the record does not support any increase in the truckload ratings.

In rebuttal, respondents introduced additional testimony dealing with the operating conditions under which motor carriers handle and transport passenger automobiles. Although certain military facilities such as the Marine Corps Supply Center at Albany, Ga., have special concrete ramps for loading and unloading, these ramps are not generally available at motor carrier terminals nor at private residences where many of the deliveries are made. The witness also pointed out that it is the carriers' responsibility to block and brace; the amount of securing to be performed in connection with individual government shipments depends upon the capability of the particular government shipper. In any event, the carrier is ultimately responsible to see that blocking and bracing is proper and adequate. Not all military vehicles are operable at the time of tender. Under these circumstances, the carriers must physically push the vehicles in cross-dock situations regardless of whether the carriers or the government performed the initial loading. With regard to provisions establishing charges for private residence deliveries, the classification witness contends that such charges contemplate normal packaged freight and do not reflect the peculiar circumstances involved in delivering passenger automobiles. Respondents also introduced rebuttal cost evidence, but this data is subject to the same deficiencies previously discussed in connection with protestant's evidence. Other deficiencies in respondents' cost showing are summarized in Appendix C.



## Discussion and Conclusions

The issue in this proceeding is whether the proposed increased ratings and LTL minimum weight have been shown to be just and reasonable. The burden of proof is upon respondents under section 216(g) of the Act.

As the Commission has frequently stated, the primary purpose of a freight classification is to assign each article, or a group of articles, to a class according to well-known classification principles or elements which recognize distinctions from a transportation standpoint, along fairly broad lines, in order to meet the needs of commerce. None of the principles or elements should be controlling, but all that are relevant should be considered. Among them are: weight per cubic foot, and value per pound; liability to loss, damage or theft in transit; likelihood of injury to other freight with which it may come in contact; kind of container or package as bearing upon liability or risk; expense of, and care in handling; ratings on analogous articles; fair relation of ratings as between all articles; and competition between articles of different descriptions but largely used for similar purposes. See *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508-509.

In view of limitations upon the capacity of motor-carrier equipment, it has been recognized that the railroad classification ratings may be unsuitable as applied to transportation by motor vehicle, and that certain factors such as density warrant additional consideration in determining the reasonableness of motor classification ratings.

The present ratings on uncrated motor vehicles do not take into account the transportation characteristics of the commodity when handled in LTL movements by motor common carriers. In support of increased ratings, respondents have stressed primarily the low density of passenger vehicles, their susceptibility to damage, and the handling and stowing problems presented in transporting this commodity. High value was also cited, but respondents failed to introduce any specific evidence with regard to this factor.

The most persuasive evidence of record pertains to the low density characteristics of uncrated automobiles. Based upon consideration of 610 automobile models, including both American and foreign cars, the average density of the commodity is 3.43 pounds per cubic foot. (See Appendix B). Protestant arrives at a slightly higher average density of 3.86 using the dimensions of the actual vehicles transported in its study, the majority of which were jeeps or other military passenger vehicles.[5] The examiner finds the method employed by respondents more reliable, since the proposed classification item applies nationwide to *all* passenger motor vehicles, NOI, and is not confined to the military vehicles which predominate in protestant's computations. However, whichever figure is accepted, the average density of the considered commodity is clearly less than 4 pounds per cubic foot.

In *Incandescent Electric Lamps or Bulbs,* 44 M.C.C. 501, 513, the Commission held that the following ratings, in relation to the density shown, would be reasonable maxima on commodities moving under any-quantity rates by motor carrier and would provide a practical guide in the determination of ratings where density is a predominant element to be considered:

[5] The Department's exhibit lists shipments of 87 jeeps, 35 other military vehicles, and 91 private vehicles. The remaining 10 vehicles are not identified.



| *Density Range* (Pounds Per Cu. Ft.) | *Rating* |
|---|---|
| 1.5 and less | 500 |
| 1.6 - 2.0 | 425 |
| 2.1 - 3.0 | 350 |
| 3.1 - 4.0 | 275 |
| 4.1 - 5.0 | 200 |
| 5.1 - 6.0 | 175 |
| 6.1 - 7.0 | 150 |
| 7.1 - 8.0 | 125 |
| 8.1-10.0 | 100 |

The proposed LTL rating of 250 is less than the maxima set forth in the *Incandescent Lamp* case, *supra,* for commodities having densities between 3 and 4 pounds per cubic foot, a fact which has been accorded considerable weight in other classification proceedings. See, for example, I. & S. No. M-24365, *Classification Rating on Aluminum Cots, Nationwide,* decided May 11, 1971, and I. & S. No. M-24478, *Classification Ratings on Swimming Pool Slides, Nationwide,* decided October 12, 1971.

The evidence is also convincing that the handling and stowing of automobiles presents unusual difficulties. Although protestant has demonstrated that the government renders assistance on many of its LTL motor vehicle shipments, such aid by no means resolves all the problems incurred by respondents. Delivery must frequently be effected at private residences where no assistance or equipment is available. Cross-dock handling is extremely difficult, particularly where the automobile is inoperable. Extensive blocking and bracing are required to keep the car from shifting. Since other commodities cannot safely be loaded next to or on automobiles, the vehicle in effect occupies the entire area from floor to ceiling and sidewall to sidewall. Erection of full height-of-trailer bulkheads is required in some instances to separate the passenger automobile from other freight.

On the matter of loss and damage, the record does not conclusively establish that this factor is abnormally high on automobiles as compared to other LTL traffic. On the other hand, uncrated passenger vehicles clearly present unusual damage risks, and this is an element which may properly be considered in establishing classification ratings. See *Class Rate Investigation, 1939, supra.*

In sum, upon consideration of the transportation characteristics of passenger vehicles, as well as the table of densities and ratings approved in *Incandescent Electric Lamps or Bulbs, supra,* the examiner concludes that the proposed LTL rating of 250 is warranted under the provisions of the Interstate Commerce Act. The same finding cannot be made under the economic stabilization program and the regulations promulgated by the Commission in Ex Parte No. 280, *Special Procedures for Tariff Filings under the Wage and Price Stabilization Program,* 49 C.F.R. § 1311, 37 F.R. 14308, July 19, 1972. Although the classification rating assigned to a commodity is separate and distinct from the rate level in dollars and cents, the proposal at issue clearly is within the purview of such regulations. Section 1311.0(c) provides as follows:

> The Economic Stabilization Program requires, and the Commission shall find in any case in which an order is entered, that every increase (whether or not it is a "reportable increase" as defined in this part) in the rates, as defined in section 15a(1) of the Interstate Commerce Act (49 U.S.C. § 15a(1)), for transportation services subject to Parts I, II, III, and IV of the Act—
>
> (1) is cost-justified and does not reflect future inflationary expectations;
>
> (2) is the minimum increase required to assure continued, adequate, and safe service or to provide for necessary expansion to meet future requirements for transportation services;



> (3) is the increase which will achieve the minimum rate of return needed to attract capital at reasonable costs and not to impair the credit of the carrier;
>
> (4) does not reflect labor costs in excess of those allowed by Price Commission policies; and
>
> (5) takes into account expected and obtainable productivity gains.

The term "rates" as defined in section 15a(1) includes "all classifications, regulations, and practices relating thereto," and changes in classification ratings are not among the types of publications exempted under section 1311.0(d). Accordingly, the considered increased ratings must be shown to conform to the criteria set forth above. There is no evidence of record to support a finding of this nature.

Nor has the proposed minimum weight of 3,500 pounds been justified. As pointed out by protestant, minimum weight provisions are usually published on truckload traffic whereas less-than-truckload shipments ordinarily move at actual weight. Respondents urge that an LTL minimum weight is not unusual where the class rating does not properly reflect the loss of space in carrier vehicles due to a commodity's unusual size, shape, configuration or weight. No specific evidence was introduced to show that this is the case with regard to passenger automobiles. On the contrary, the space occupancy of the considered commodity has already been taken into consideration in establishing the increased LTL rating, and no need has been demonstrated for publication of a minimum weight in connection therewith. Thus, respondents have failed to meet their burden of proof with regard to the minimum-weight provision.

Similarly, the increased truckload rating of 125 has not been shown to be just and reasonable. Respondents did not

present any data concerning truckload movements of passenger automobiles, and the record contains no evidentiary support for the assertion that the proposed TL rating is "appropriate."

The hearing examiner finds (1) that the involved schedules have not been shown to be just and reasonable to the extent that they propose an increased truckload rating of 125 and an LTL minimum weight of 3,500 pounds, and (2) that the proposed LTL classification rating of 250 on motor vehicles, NOI, including ambulances or hearses, although just and reasonable under the Act, has not been shown to be in conformity with the Economic Stabilization Program and the Commission's rules and regulations promulgated in furtherance thereof. Inasmuch as the evidence in this proceeding was presented prior to adoption of the Commission's recent regulations in Ex Parte No. 280, the respondents should be accorded an opportunity to submit additional evidence to support a finding that the LTL classification rating, otherwise shown to be lawful, is in conformity which price stabilization criteria. Cancellation of the schedules, as hereinafter required, will therefore be without prejudice to such action.

The examiner further finds that this decision is not a major Federal action significantly affecting the quality of the environment within the meaning of the National Environmental Policy Act of 1969.

Accordingly, it is the ORDER of the Hearing Examiner:

(1) That the respondents be, and they are hereby, notified and required within 40 days after the effective date of this order to cancel the schedules described in the order entered in this proceeding on November 27, 1970, upon not less than 1 day's notice to this Commission and the general public by filing and posting in the manner prescribed in section 217 of the Interstate Commerce Act, without prejudice to the filing by respondents of additional evidence,



in the form of verified statements, as specified in the above findings, which filing shall stay the required cancellation insofar as it relates to the schedules herein found shown to be just and reasonable but not in conformity with the economic stabilization program as implemented by the Commission's regulations in Ex Parte No. 280.

(2) Such additional evidence, if any, shall be filed on or before 35 days from the date of service of this order; protestant may file evidence in rebuttal thereto within 20 days from the date of filing of respondents' evidence; and respondents' reply statement shall be due 10 days thereafter.

(3) That in the absence of a stay or postponement by the Commission, or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service hereof.

Dated at Washington, D.C., this 21st, day of August, 1972.

By the Commission, Janice M. Rosenak, Hearing Examiner.

(SEAL)

ROBERT L. OSWALD,
Secretary.

## Appendix A

On brief, respondents renew their objection to the ruling of the examiner excluding from evidence material identified as Appendices B, D, and E to Exhibit No. 1, the verified statement of Gordon H. Anderson. The excluded matter consists of vertified statements of witnesses and statements of facts and arguments filed in other proceedings involving reparations claims by the government in connection with the movement of passenger automobiles.[1] Clearly the portions which are argument (Appendix D, page 5-10 and Appendix E, page 4) are contrary to rule 84 of the Commission's General Rules of Practice (49 C.F.R. § 1100. 84) and will not be considered. As for the remaining portions of the exhibit, the witness is a member of the National Classification Board and respondents urge that the appendices should be admitted on the ground that the material was received by the Board in the course of its normal duties pursuant to the procedures approved by the Commission in *National Classification Committee-Agreement,* 299 I.C.C. 519. The evidence will be admitted, not as proof of the truth of the statements contained therein since the exhibits were not prepared in the normal course of business, but only to the extent supported by respondents' classification expert, namely, as illustrative of the fact that certain carriers claim they are encountering difficulties in handling passenger automobiles and that litigation has resulted.[2] Admission of these appendices will not prejudice protestant, particularly since the same parties participated in all the cited proceedings. Compare *Terminal Transport Co., Inc.*

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[1] Docket No. 35282, The United States of America v. Western Gillette, Inc., et al, No. 35293, The United States of America v. Central Truck Lines, Inc. et al, and No. 35320, United States of America v. Red Ball Motor Freight, Inc. et al.

[2] Official notice may of course be taken of the pendency of other proceedings before the Commission. See *Ayers Extension—Cheyenne, Wyo.,* 99 M.C.C. 795.



*Ext.—Michigan Points,* 111 M.C.C. 343, 346. Moreover, it is the examiner's view that this disputed evidence does not materially affect the outcome of the proceeding.

The respondents also renew their objection to rulings of the examiner admitting in evidence protestant's cost exhibits (Exhibit No. 18 and Exhibit No. 16, pages 8-21). It is contended that the costs of transporting particular commodities are irrelevant and immaterial in a proceeding dealing with the lawfulness of classification ratings. While costs alone may not determine whether a rating is just and reasonable, cost data has been considered relevant in challenging contentions by respondents that a new rule or classification was necessary to make particular traffic pay its share of the transportation burden. See *Classification Ratings Based on Density,* 337 I.C.C. 784, 789-790. That is analogous to the situation in the present proceeding; respondents' testimony contains reference to such matters as "revenue-producing problems" encountered in transporting passenger automobiles, "unique handling problems" and "the extremely high cost of automobile body repair." Under the circumstances, protestant's cost evidence was properly received in this case.

Exception is taken by protestant to the examiner's admission of a three-page statement issued by State Farm Automobile Insurance Company referring to high repair and replacement costs as justification for increased insurance premium rates. The examiner's ruling is affirmed; the objection relates primarily to the weight to be accorded the evidence rather than its admissibility. However, while the document is admitted, the examiner agrees with protestant that this exhibit concerning the damage which results when two cars crash at low speeds has little if any probative value in establishing the extent of damage occuring during movements of vehicles in van-type trailers.

## Appendix B

I. Weight and Length Characteristics of Automobiles Developed by Respondents from the National Automobile Dealers Association Official Used Car Guide (January, 1971)[1]

A. *Number of Automobile Manufacturers*

| | |
|---|---|
| American | 15 |
| Foreign | 21 |
| All | 36 |

B. *Average Weight (Pounds)*

| | | |
|---|---|---|
| All Manufacturers | (610 Models) | 3,345 |
| American | (499 Models) | 3,587 |
| Foreign | (111 Models) | 2,255 |

C. *Average Length (Inches)*

| | | |
|---|---|---|
| All Manufacturers | (612 Models) | 201 |
| American | (500 Models) | 209 |
| Foreign | (112 Models) | 167 |

[1] Because of the loading characteristics of automobiles in relation to trailer size, automobile height and width does not affect space occupancy; length is the only variable factor taken into account in computing cubic displacement. Since 98.2 percent of trailers in use by motor carriers are 90 inches or greater in interior loading height and 98.7 percent have 93 inches or less in interior width, such figures were used in respondents' density computations. Thus, 90″ (height) x 93″ (width) x 209″ (length) = 1,749,330 divided by 1,728 (inches per cubic foot) = 1,012 cubic feet, the cubic displacement figure for American car models. This figure is then divided into the weight to determine density. Similar computations were used to compute density for foreign models, and for American and foreign cars, combined.



II. Density Computations Using Average Length of Passenger Automobiles in Protestant's Survey of Actual LTL Movements (Exhibit No. 6)

| | | |
|---|---|---|
| Average length of 101 private automobiles @ 190″ | = 19,190″ | |
| Average length of 87 jeeps @ 133″ | = 11,571″ | |
| Average length of other military vehicles @ 153″ | = 5,355″ | |
| Total | 36,116″ | |
| Average length of all vehicles (total ÷ 223) | = 162″ [2] | |
| Average length (162″) x width of van space (93″) x height of van space (90″) = 1,355,940 cubic inches divided by 1,728 | = 784.69 cu. ft. | |
| Less 10 percent broken stowage deduction | 78.47 | |
| Average van space occupancy | 706.22 cu. ft. | |
| Average weight of passenger vehicles shipped | 2,726 pounds | |
| Divided by average van space occupancy | 706.22 cu. ft. | |
| Density | 3.86 pounds per cu. ft. | |
| Density without stowage reduction | 3.46 pounds per cu. ft. | |

[2] In another computation, protestant used a length of 162.457″, resulting in a density of 3.847 pounds per cubic foot. Protestant also refers to a density of 8.06 pounds if space occupancy is not considered. The latter figure is clearly inapposite in view of the loading characteristics of automobiles as demonstrated on this record.

## Appendix C

### Cost Evidence Introduced by the Parties

In Exhibit 16, as supplemented by Exhibit 18, protestant developed variable costs and costs at the revenue need level based on regional average costs for Transcontinental Territory, South-Central Territory and an average of Southwestern-Eastern Central Territories. Cost procedures generally followed I.C.C. Statement No. 7-69, Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities—1968, with adjustments. Since the density of passenger automobiles falls between 0-4.9 pounds per cubic foot, protestant used the lowest range in the density adjustment ratios (Table 9) in constructing variable costs. Interchange costs were developed on the basis of an average of 1.3 per movement, except in South-Central Territory where an average incidence of .9 interchanges per movement was used.

The costs developed by protestant for the various territories, together with the revenue comparisons presented, are as follows:

TRANSCONTINENTAL TERRITORY

| Line No. | Cost Increment | Source | | |
|---|---|---|---|---|
| 1. | Line-haul cost per cwt. mile | P. 189, Table 7, Line 19, Col. (2) | | .14158 |
| 2. | Miles of Haul (average) | DOD Exhibit 2, p. E2-6 | | 2169 |
| 3. | Line-haul cost per cwt. | Line 1 x line 2 | | 307.087 |
| 4. | Pickup and delivery cost per cwt. | P. 185, Table 4, Lines 11, 12, Col. (3) [a] | | 59.004 |
| 5. | Terminal platform cost per cwt. | P. 185, Table 4, Lines 11, 12, Col. (6) [a] | | 72.083 |
| 6. | Interchange cost per cwt. | P. 185, Table 4, Lines 11, 12, Col. (9) [a] | 69.634 | |
| 7. | Number of interchanges (average) | DOD Exhibit 2, p. E2-6 [b] | 1.3 | |
| 8. | Interchange cost per cwt. | Line 6 x line 7 | | 90.524 |
| 9. | Billing and collecting cost per cwt. | P. 185, Table 4, Lines 11, 13, Col. (7) [a] | 5.176 | |
| 10. | Number of Carriers | DOD Exhibit 2, p. E2-6 [b] | 2.3 | |
| 11. | Billing cost per cwt. | Line 9 x line 10 | | 11.905 |
| 12. | Total variable cost per cwt. | Sum. L. 3, 4, 5, 8 & 11 | (cents) | 540.603 |
| 13. | Cwt. per shipment | DOD Exhibit 2, p. E2-6 | | 28.12 |
| 14. | Total variable cost per shipment | Line 12 x line 13 | | $152.02 |
| 15. | Density Adjustment Ratio | P 192, Table 9, Last line, Col. (3) | | 1.83 |
| 16. | Total variable cost per shipment adjusted for density | Line 14 x line 15 | | $278.20 |
| 17. | Total Revenue Need Level | Line 16 x 117.69% [c] | | $327.41 |
| 18. | Revenues Proposed Basis | DOD Exhibit 2, p. E2-6 | | $911.59 |
| 19. | Present Classification Basis | DOD Exhibit 2, p. E2-6 | | $430.98 |
| | Ratios of Revenues to Cost at Revenue Need Level | | | |
| 20. | Proposed Basis | Line 18 + line 17 | | 278.4% |
| 21. | Present Classification Basis | Line 19 + line 17 | | 131.6% |
| | Revenues in Excess of Cost at Revenue Need Level | | | |
| 22. | Proposed Basis | Line 18 minus line 17 | | $584.18 |
| 23. | Present Classification Basis | Line 19 minus line 17 | | $103.57 |

Cwt. means hundredweight.

[a] Adjusted to Average weights as shown on line 13.

[b] 117 as shown, plus postulated 82 undisclosed intermediate carriers.

[c] Statement No. 7-69, page 6, line 13.

## SOUTH CENTRAL TERRITORY

| Line No. | Cost Increment | Source | | |
|---|---|---|---|---|
| 1. | Line-haul cost per cwt. mile | P 163, Table 7, Line 18, Col. (2) | | .15313 |
| 2. | Miles of Haul | DOD Exhibit 3, p. E3-2 | | 956 |
| 3. | Line-haul cost per cwt. | Line 1 x line 2 | | 146.392 |
| 4. | Pickup and delivery cost per cwt. | P. 159, Table 4, Lines 11, 12, Col. (3) [a] | | 45.982 |
| 5. | Terminal platform cost per cwt. | P 159, Table 4, Lines 11, 12, Col. (6) [a] | | 53.003 |
| 6. | Interchange cost per cwt. | P. 159, Table 4, Lines 11, 12, Col. (9) [a] | 56.723 | |
| 7. | Number of interchanges | DOD Exhibit 3, p E3-2 [b] | .9 | |
| 8. | Interchange cost per cwt. | Line 6 x line 7 | | 51.051 |
| 9. | Billing and collecting cost per cwt. | P. 159, Table 4, Lines 11, 12, Col. (7) [a] | 4.354 | |
| 10. | Number of Carriers | DOD Exhibit 3, p. E3-2 [b] | 1.9 | |
| 11. | Billing cost per cwt. | Line 9 x line 10 | | 8.273 |
| 12. | Total variable cost per cwt. | Sum L. 3, 4, 5, 8 & 11 | | 304.701 |
| 13. | Cwt. per shipment | DOD Exhibit 3, p. E3-2 | | 27.16 |
| 14. | Total variable cost per shipment | Line 12 x line 13 | | $ 82.76 |
| 15. | Density Adjustment Ratio | P. 166, Table 9, Line 13, Col. (3) | | 1.94 |
| 16. | Total variable cost per shipment adjusted for density | Line 14 x line 15 | | $160.55 |
| 17. | Total Revenue Need Level | Line 16 x 117.68% [c] | | 188.93 |
| 18. | Revenues Proposed Basis | DOD Exhibit 3, p. E3-2 | | 460.35 |
| 19. | Present Classification Basis | DOD Exhibit 3, p. E3-2 | | 215.19 |
| | Ratios of Revenues to Costs at Revenue Need Level | | | |
| 20. | Proposed Basis | Line 18 + line 17 | | 243.7% |
| 21. | Present Classification Basis | Line 19 + line 17 | | 113.9% |
| | Revenues in Excess of Costs at Revenue Need Level | | | |
| 22. | Proposed Basis | Line 18 minus line 17 | | $271.42 |
| 23. | Present Classification Basis | Line 19 minus line 17 | | $ 26.26 |

Cwt. means hundredweight.

[a] Adjusted to Average weights as shown on line 13.

[b] 32 as shown, plus postulated 16 undisclosed intermediate carriers.

[c] Statement No. 7-69, page 6, line 11.



## SOUTHWESTERN TO EASTERN CENTRAL MOVEMENTS

| Line No. | Cost Increment | Source | | Southwestern | Eastern Central | Average | Total or Average |
|---|---|---|---|---|---|---|---|
| 1. | Line-haul cost per cwt. mile | Pp. 33, 176, Table 7, Line 19, Col. (2) | | .13383 | .14921 | | .14152 |
| 2. | Miles of Haul | DOD Exhibit 4 | | | | | 1786 |
| 3. | Line-haul cost per cwt. | Line 1 x line 2 | | | | | 252.75 |
| 4. | Pickup and delivery cost per cwt. | Pp. 29, 172, Table 4, Lines 11, 12, Col. (3) [a] | | 45.13 | 61.39 | | 53.26 |
| 5. | Terminal platform cost per cwt. | Pp. 29, 172, Table 4, Lines 11, 12, Col. (6) [a] | | 53.60 | 65.96 | | 59.78 |
| 6. | Interchange cost per cwt. | Pp. 29, 172, Table 4, Lines 11, 12, Col. (9) [a] | | 74.10 | 94.80 | 84.45 | |
| 7. | Number of interchanges | DOD Exhibit 4 | [b] | | | 1.3 | |
| 8. | Interchange cost per cwt. | Line 6 x line 7 | | | | | 109.59 |
| 9. | Billing and collecting cost per cwt. | Pp. 29, 172, Table 4, Lines 11, 12, Col. (7) [a] | | 3.28 | 4.74 | 4.01 | |
| 10. | Number of Carriers | DOD Exhibit 4 | [b] | | | 2.3 | |
| 11. | Billing cost per cwt. | Line 9 x line 10 | | | | | 9.23 |
| 12. | Total variable cost per cwt. | Sum L. 3, 4, 5, 8 & 11 | | | | | 484.51 |
| 13. | Cwt. per shipment | DOD Exhibit 4 | | | | | 25.99 |
| 14. | Total variable cost per shipment | Line 12 x line 13 | | | | | $125.92 |
| 15. | Density Adjustment Ratio | Pp. 36, 179, Table 9, Line 13, Col. (3) | | 2.00 | 1.98 | | 1.99 |
| 16. | Total variable cost per shipment adjusted for density | Line 14 x line 15 | | | | | $250.58 |
| 17. | Total Revenue Need Level | Line 16 x 117.69% | [c] | | | | 295.78 |
| 18. | Revenues Proposed Basis | DOD Exhibit 4 | | | | | 705.36 |
| 19. | Present Classification Basis | DOD Exhibit 4 | | | | | 320.70 |
| | Ratios of Revenues to Costs at Revenue Need Level | | | | | | |
| 20. | Proposed Basis | Line 18 + line 17 | | | | | 238.47% |
| 21. | Present Classification Basis | Line 19 + line 17 | | | | | 108.43% |
| | Revenues in Excess of Costs at Revenue Need Level | | | | | | |
| 22. | Proposed Basis | Line 18 minus line 17 | | | | | $409.58 |
| 23. | Present Classification Basis | Line 19 minus line 17 | | | | | $ 24.92 |

Cwt. means hundredweight.

[a] Adjusted to Average weights as shown on line 13.

[b] 11 as shown, plus postulated 6 undisclosed intermediate carriers.

[c] Statement No. 7-69, page 6.

Respondents' cost witness developed regional average costs for the same territories using the same unit costs and operating factors as the protestant. The principal difference between the two cost studies was the method of adjusting the costs for density. Respondents' cost computations were based on a density of 2.78 pounds per cubic foot; use of this density was improper in view of rebuttal testimony by witness Anderson that the density of the commodity was 3.43 pounds per cubic foot.

In Exhibit 20, respondents computed line-haul costs per hundredweight by dividing the computed density of the automobiles into the cubic foot capacity of the trailer to obtain the maximum load of the trailer. This amounted to 66.72 hundredweight, which figure was then divided into the regional variable cost per vehicle mile to obtain the cost per hundredweight mile. Respondents' method is not appropriate since use of a density factor exclusively for line-haul costs must be supported by specific operating information as to inbound and outbound traffic. See page 23 of Statement No. 7-69. Also, separate density adjustments of that nature may be used only when the commodity being shipped occupies the space or weight capacity of the vehicle which is not the case here. In adjusting pickup and delivery, platform handling and interchange costs, respondents selected density adjustment ratios from Table 4 of the various territorial cost scales. Again, the method used assumes that the shipment occupies the entire cubic capacity of the trailer. Since it appears that passenger vehicles are shipped with other weight shipments of different commodities and densities which are not known, the proper density adjustment is that set forth in Table 9 of Statement No. 7-69 for the miles and density group involved.

Following is a summary of the cost data presented by respondents:



TRANSCONTINENTAL TERRITORY

| Line No. | Item (1) | Source (2) | Amount (3) |
|---|---|---|---|
| | **LINE-HAUL SERVICE** | | |
| 1. | Cost per vehicle mile | P. 183, line 1, col. 7 * | 43.323¢ |
| 2. | Vehicle Capacity (Cu. Ft.) | Page 24 * | 2400 |
| 3. | Lbs. Per Cu. Ft. | Exh. 16, p. 10 (D.O.D.) | 2.78 |
| 4. | Maximum Load | Line 2 x line 3 | 66.72 |
| 5. | Cost Per Cwt.-Mile | Line 1 ÷ line 4 | .64933¢ |
| 6. | Miles of Haul | Exh. 6, p. E 2-6 (D.O.D.) | 2169 |
| 7. | Cost Per Cwt. | Line 5 x line 6 | 1408.397¢ |
| | **ORIGIN AND DESTINATION SERVICE** | | |
| | Pickup & Delivery: | | |
| 8. | Cost Per Cwt. | P. 185 * 1 | 59.004¢ |
| 9. | Density Ratio | P. 185 * 2 | 2.92 |
| 10. | Adj. Cost Per Cwt. | Line 8 x line 9 | 172.292¢ |
| | Platform: | | |
| 11. | Cost Per Cwt. | P. 185 * 1 | 72.083¢ |
| 12. | Density Ratio | P. 185 * 3 | 2.05 |
| 13. | Adj. Cost Per Cwt. | Line 11 x line 12 | 147.770¢ |
| | Billing & Collecting: | | |
| 14. | Cost Per Shipment | P. 183, line 5, col. 7 * | 115.183¢ |
| 15. | Cost Per Cwt. | Line 14 ÷ line 28 | 4.096¢ |
| | **INTERCHANGE SERVICE** | | |
| | Pickup & Delivery: | | |
| 16. | Cost Per Cwt. | P. 188, line 8, col. 2 * 4 | 23.5¢ |
| 17. | Density Ratio | P. 185 * 5 | 2.92 |
| 18. | Adj. Cost Per Cwt. | Line 16 x line 17 | 68.620¢ |
| | Platform: | | |
| 19. | Cost Per Cwt. | P. 188, line 8, Col. 4 * 4 | 74.0¢ |
| 20. | Density Ratio | P. 185 * 5 | 2.05 |
| 21. | Adj. Cost Per Cwt. | Line 19 x line 20 | 151.700¢ |
| | Billing & Collecting: | | |
| 22. | Cost Per Shipment | P. 183, line 5, Col. 7 * | 115.183¢ |
| 23. | Cost Per Cwt. | Line 22 ÷ line 28 | 4.096¢ |
| 24. | Total Cost Per Interchange | Lines 18, 21 & 23 | 224.416¢ |
| 25. | No. of Interchanges | Exh. 6, p. E 2-6 (D.O.D.) | 1.3 |
| 26. | Total Int. Cost Per Cwt. | Line 24 x line 25 | 291.741¢ |
| | **REVENUE NEED PER SHIPMENT** | | |
| 27. | Total Cost Per Cwt. | Lines 7, 10, 13, 15 & 26 | 2024.296¢ |
| 28. | Cwt. Per Shipment | Exh. 6, p. E 2-6 (D.O.D.) | 28.12 |
| 29. | Total Cost Per Shipment | Line 27 x line 28 | $569.23 |
| 30. | Revenue Need Per Shipment | Line 29 x 1.1769 6 | $669.93 |

## SOUTH-CENTRAL TERRITORY

| Line No. | Item (1) | Source (2) | Amount (3) |
|---|---|---|---|
| | **LINE-HAUL SERVICE** | | |
| 1. | Cost per vehicle mile | P. 157, line 1, col. 7 * | 40.437¢ |
| 2. | Vehicle Capacity (Cu. Ft.) | Page 24 * | 2200 |
| 3. | Lbs. Per Cu. Ft. | Exh. 16, p. 10 (D.O.D.) | 2.78 |
| 4. | Maximum Load | Line 2 x line 3 | 61.16 |
| 5. | Cost Per Cwt.-Mile | Line 1 ÷ line 4 | .66136¢ |
| 6. | Miles of Haul | Exh. 6, p. E 3-2 (D.O.D.) | 956 |
| 7. | Cost Per Cwt. | Line 5 x line 6 | 632.547¢ |
| | **ORIGIN AND DESTINATION SERVICE** | | |
| | Pickup & Delivery: | | |
| 8. | Cost Per Cwt. | P. 159 * 1 | 45.932¢ |
| 9. | Density Ratio | P. 159 * 2 | 2.88 |
| 10. | Adj. Cost Per Cwt. | Line 8 x line 9 | 132.428¢ |
| | Platform: | | |
| 11. | Cost Per Cwt. | P. 159 * 1 | 53.003¢ |
| 12. | Density Ratio | P. 159 * 3 | 2.05 |
| 13. | Adj. Cost Per Cwt. | Line 11 x line 12 | 108.656¢ |
| | Billing & Collecting: | | |
| 14. | Cost Per Shipment | P. 157, line 5, col. 7 * | 93.839¢ |
| 15. | Cost Per Cwt. | Line 14 ÷ line 28 | 3.456¢ |
| | **INTERCHANGE SERVICE** | | |
| | Pickup & Delivery: | | |
| 16. | Cost Per Cwt. | P. 162, line 8, col. 2 * 4 | 26.9¢ |
| 17. | Density Ratio | P. 159 * 5 | 2.38 |
| 18. | Adj. Cost Per Cwt. | Line 16 x line 17 | 60.192¢ |
| | Platform: | | |
| 19. | Cost Per Cwt. | P. 162, line 8, col. 4 * 4 | 56.5¢ |
| 20. | Density Ratio | P. 159 * 5 | 2.05 |
| 21. | Adj. Cost Per Cwt. | Line 19 x line 20 | 115.825¢ |
| | Billing & Collecting: | | |
| 22. | Cost Per Shipment | P. 157, line 5, col. 7 * | 93.839¢ |
| 23. | Cost Per Cwt. | Line 22 ÷ line 28 | 3.456¢ |
| 24. | Total Cost Per Interchange | Lines 18, 21 & 23 | 179.473¢ |
| 25. | No. of Interchanges | Exh. 6, p. E 3-2 (D.O.D.) | .9 |
| 26. | Total Int. Cost Per Cwt. | Line 24 x line 25 | 161.526¢ |
| | **REVENUE NEED PER SHIPMENT** | | |
| 27. | Total Cost Per Cwt. | Lines 7, 10, 13, 15 & 26 | 1038.613 |
| 28. | Cwt. Per Shipment | Exh 6, p. E 3-2 (D.O.D.) | 27.16 |
| 29. | Total Cost Per Shipment | Line 27 x line 28 | $282.09 |
| 30. | Revenue Need Per Shipment | Line 29 x 1.1768 6 | $331.96 |



## SOUTHWESTERN TO EASTERN-CENTRAL

| Line No. | Item (1) | Source (2) | Amounts: Southwestern (3) | Amounts: Eastern Central (4) | Total or Average (5) |
|---|---|---|---|---|---|
| | **LINE-HAUL SERVICE** | | | | |
| 1. | Cost per vehicle mile | P. 157, 27, Line 1, Col. 7 * | 37.51¢ | 44.099¢ | 40.725¢ |
| 2. | Vehicle Capacity (Cu. Ft.) | Page 24 * | 2300 | 2100 | 2200 |
| 3. | Lbs. Per Cu. Ft. | Exh. 16, Page 10 (DOD) | | | 2.78 |
| 4. | Maximum Load | Line 2 x Line 3 | | | 61.16 |
| 5. | Cost Per Cwt.-Mile | Line 1 ÷ Line 4 | | | .66588¢ |
| 6. | Miles of Haul | Exh. 6, p. E4-1 | | | 1786 |
| 7. | Cost Per Cwt. | Line 5 x Line 6 | | | 1189.262¢ |
| | **ORIGIN AND DESTINATION SERVICE** | | | | |
| | Pickup & Delivery: | | | | |
| 8. | Cost Per Cwt. | P. 172.29 * 1 | 45.13¢ | 61.39¢ | |
| 9. | Density Ratio | P. 172.29 * 2 | 3.00 | 3.12 | |
| 10. | Adj. Cost Per Cwt. | Line 8 x Line 9 | 135.390¢ | 191.536¢ | 163.464¢ |
| | Platform: | | | | |
| 11. | Cost Per Cwt. | P. 172.29 * 1 | 53.60¢ | 65.96¢ | |
| 12. | Density Ratio | P. 172.29 * 3 | 2.05 | 2.05 | |
| 13. | Adj. Cost Per Cwt. | Line 11 x Line 12 | 119.880¢ | 135.218¢ | 122.549¢ |
| | Billing & Collecting: | | | | |
| 14. | Cost Per Shipment | P. 170, 27, Line 5, Col. 7 * | 67.713¢ | 97.613¢ | 82.663¢ |
| 15. | Cost Per Cwt. | Line 14 ÷ Line 28 | | | 3.181¢ |
| | **INTERCHANGE SERVICE** | | | | |
| | Pickup & Delivery: | | | | |
| 16. | Cost Per Cwt. | P. 175, 32, Line 8, Col. 2 * 4 | 15.7¢ | 22.3¢ | |
| 17. | Density Ratio | P. 172, 29 * 5 | 3.00 | 3.12 | |
| 18. | Adj. Cost Per Cwt. | Line 16 x Line 17 | 47.100¢ | 69.576¢ | 58.338¢ |
| | Platform: | | | | |
| 19. | Cost Per Cwt. | P. 175, 32, L. 8 Col. 4 * 4 | 54.5¢ | 68.0¢ | |
| 20. | Density Ratio | P. 172, 29 * 5 | 2.05 | 2.05 | |
| 21. | Adj. Cost Per Cwt. | Line 19 x Line 20 | 111.725¢ | 139.400¢ | 125.563¢ |
| | Billing & Collecting: | | | | |
| 22. | Cost Per Shipment | P. 170, 27, L. 5, Col. 7 * | 67.713¢ | 97.613¢ | 82.663¢ |
| 23. | Cost Per Cwt. | Line 22 ÷ Line 28 | | | 3.181¢ |
| 24. | Total Cost Per Interchange | Lines 18, 21 & 23 | | | 187.082¢ |
| 25. | No. of Interchanges | Exh. 6, p. E4-1 (DOD) | | | 1.3 |
| 26. | Total Int. Cost Per Cwt. | Line 24 x Line 25 | | | 243.207¢ |
| | **REVENUE NEED PER SHIPMENT** | | | | |
| 27. | Total Cost Per Cwt. | Lines 7, 10, 13, 15, 26 | | | 1721.663¢ |
| 28. | Cwt. Per Shipment | Exh. 6, p. E4-1 (DOD) | | | 25.99 |
| 29. | Total Cost Per Shipment | Line 27 x Line 28 | | | $447.46 |
| 30. | Revenue Need Per Shipment | Line 29 x 1.1804 6 | | | $528.18 |

## Footnotes:—Respondents' Cost Restatement

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* Starred references are to Statement No. 7-69.

1 The unit costs shown are the same as developed by Witness Scarborough by interpolation between the unit costs for 2,000 and 3,000 pound shipments.

2 The density adjustment ratios for pickup and delivery for the density group, 0-4.9 pounds per cubic foot, are set forth in Statement No. 7-69 at pages 185, 159, 172, and 29, respectively.

3 The density adjustment ratio for platform expense for the density group, 0-4.9 pounds per cubic foot, set forth in Statement No. 7-69 is the same for all four territories, 1.85. Adjustment to reflect 2.8 pounds per cubic foot rather than 3.8 would increase this ratio to 2.05.

4 The unit costs set forth for each region in Table 4 of Statement No. 7-69 for "cost for one interchange of cargo," as well as the density adjustment ratios applicable thereto, are a composite of the three cost elements, vehicle transfer (pickup and delivery), platform, and billing and collecting. For any given density group (such as 0-4.9) it is impossible to have one density adjustment which is equally applicable to shipments weighing from 100 to 9,000 pounds since the impact of density increases as shipment weight increases.

5 Since Statement No. 7-69 does not provide separate adjustment ratios for interchange pickup and delivery and interchange platform, the same ratios are used as for origin and destination service.

6 Statement No. 7-69, page 6. Ratio at page 6 hereto is average of ratios for Eastern-Central (1.1818) and Southwest (1.1789).

# APPENDIX E

## APPENDIX E

### Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 15th day of August, 1974.

INVESTIGATION AND SUSPENSION DOCKET No. M-24488

CLASSIFICATION RATINGS ON PASSENGER AUTOMOBILES, NATIONWIDE

*It appearing,* That by decision and order on reconsideration, dated September 7, 1973, Appellate Division 2 affirmed and adopted the decision and order of Review Board Number 4, dated March 5, 1973, affirming and adopting the initial decision, served August 30, 1972, which found (1) that the involved schedules had not been shown to be just and reasonable to the extent that they proposed an increased truckload classification rating of 125 and a less-than-truckload minimum weight of 3,500 pounds and (2) that the proposed less-than-truckload (LTL) classification rating of 250 on passenger vehicles, NOI, including ambulances and hearses, although just and reasonable under the Interstate Commerce Act, had not been shown to be in conformity with the Economic Stabilization Act of 1970, as amended, and the Commission's Rules promulgated in Ex Parte No. 280, *Special Procedures for Tariff Filings under the Wage and Price Stabilization Program,* as amended, and ordered respondents to cancel the schedules to the extent found not shown to be just and reasonable, but held the proceeding open to afford respondents an opportunity to submit evidence to show that the proposed class 250 LTL classification rating found just and reasonable would be consistent with the goals of Phase IV of the President's Economic Stabilization Program;

*It further appearing,* That in a subsequent decision and order on further consideration, dated January 29, 1974, Appellate Division 2 found that respondents had not shown

the proposed class 250 LTL classification rating on passenger vehicles, NOI, including ambulances and hearses, primarily found just and reasonable, to be consistent with Phase IV of the President's Economic Stabilization Program, and ordered the cancellation of the considered schedules in their entirety;

*And it further appearing,* That by petition filed April 1, 1974, respondents herein seek reconsideration of the aforesaid decision and order on further consideration of January 29, 1974, on various grounds, to which protestant replied on April 22, 1974, moving to reject or deny the petition, alleging violation of rule 101(g) of the Commission's General Rules of Practice, and laches;

*And it further appearing,* That the Economic Stabilization act of 1970, as amended, upon which the Economic Stabilization Program and the Ex Parte No. 280 regulations were based, expired on April 30, 1974, thereby making compliance with said regulations unnecessary;

Wherefore, and good cause appearing therefor:

*We find,* That, in the light of the expiration of the President's Economic Stabilization Program the issues raised thereto in the respondents' petition for reconsideration of April 1, 1974, and the protestant's reply and motion thereto, have become moot, and that consistent with the order of September 7, 1973, which adopted and affirmed the findings of Review Board Number 4 as to the justness and reasonableness under the Interstate Commerce Act of the proposed increased class 250 LTL classification rating on passenger vehicles, NOI, including ambulances and hearses, the said increased classification rating should be permitted to become effective; and

*It is ordered,* That the respondents herein be, and they are hereby, notified and required, within 35 days from the service date of this order, to cancel the schedules described in the order entered November 27, 1970, by the Commis-



sion, Division 2, acting as an appellate division, to the extent the said schedules were found not shown to be just and reasonable in finding (1) at page 13 of the initial decision served August 30, 1972.

*It is further ordered,* That the proceeding be, it is hereby, discontinued.

By the Commission, Division 2, Acting as an Appellate Division.

ROBERT L. OSWALD,
*Secretary*

(SEAL)

# APPENDIX F

## APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-213

UNITED STATES OF AMERICA, *Plaintiff*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Defendants*

and

NATIONAL CLASSIFICATION COMMITTEE, *Intervenor*

**Notice of Appeal to the Supreme Court of the United States**

Notice is hereby given that the National Classification Committee, Intervening Defendant named above, hereby appeals to the Supreme Court of the United States from the Final Order entered in this cause by the Three-Judge District Court on July 14, 1976.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101, Rule 72 of the Federal Rules of Civil Procedure for the United States District Courts, and Rule 10 of Rules of the Supreme Court of the United States.

Respectfully submitted,

/s/ BRYCE REA, JR.
Bryce Rea, Jr.
918 - 16th Street, N.W.
Washington, D. C. 20006
Telephone 202-785-3700
*Counsel for Intervenor Defendant National Classification Committee*

*Of Counsel:*

REA, CROSS & KNEBEL
700 World Center Building
918 - 16th Street, N.W.
Washington, D. C. 20006

Dated: September 9, 1976

(PROOF OF SERVICE OMITTED IN PRINTING)

# APPENDIX G

# APPENDIX G

(1) 49 United States Code Annotated, preceding § 1 note, § 301 note, § 901 note, and § 1001 note.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

(2) 49 United States Code Annotated, Section 1(6)

CLASSIFICATION OF PROPERTY FOR TRANSPORTATION; REGULATIONS AND PRACTICES

It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and

just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

(3) 49 United States Code Annotated, Section 15a(2)

FAIR RETURN FOR CARRIERS

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.



(4) 49 United States Code Annotated, Sections 316(b) and (i)

RATES, FARES AND CHARGES—DUTY TO ESTABLISH REASONABLE RATES, ETC.; SERVICE AND EQUIPMENT; RULES AND REGULATIONS; REASONABLE DIVISIONS OF JOINT FARES RATES, FACILITIES FOR CARRIERS OF PROPERTY

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

TRANSPORTATION NEEDS AND FAIR RETURN CONSIDERED IN DETERMINING RATES, ETC.

(i) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

(5) 49 United States Code Annotated, Section 907(f)

COMMISSION'S AUTHORITY OVER RATES; COMPLAINTS; HEARINGS

In the exercise of its power to prescribe just and reasonable rates, fares, and charges of common carriers by water, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient water transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable water carriers, under honest, economical, and efficient management, to provide such service.

(6) 49 United States Code Annotated, Section 1006(d)

COMMISSION'S AUTHORITY OVER RATES AND PRACTICES

In the exercise of its power to prescribe just and reasonable rates and charges of freight forwarders, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent nature of freight forwarding; to the effect of rates upon the movement of traffic by the freight forwarders for which the rates and charges are prescribed; to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable freight forwarders, under honest, economical, and efficient management, to provide such service.



(7) 5 United States Code Annotated, Section 706

SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

No. 76-778

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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NATIONAL CLASSIFICATION COMMITTEE, APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

---

**On Appeal from the United States District Court for the District of Columbia**

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## MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION

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MARK L. EVANS,
*General Counsel,*

CHARLES H. WHITE, JR.,
*Associate General Counsel,*

KENNETH G. CAPLAN,
*Attorney,*
*Interstate Commerce Commission,*
*Washington, D.C. 20423.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-778

NATIONAL CLASSIFICATION COMMITTEE, APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

---

**On Appeal from the United States District Court for the District of Columbia**

---

**MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION**

---

This is an appeal from the judgment of a three-judge district court suspending an order of the Interstate Commerce Commission. The Commission submits this memorandum as an appellee pursuant to Rule 10(4) of the Rules of this Court.

## STATEMENT

1. In 1970, the National Motor Freight Traffic Association, Inc., on behalf of its motor carrier members, filed with the Commission schedules proposing

to increase the "classification ratings" applicable to the nationwide transportation of truckload ("TL") and less-than-truckload ("LTL") shipments of certain types of passenger automobiles. A classification rating is assigned to a particular commodity on the basis of the commodity's transportation characteristics.[1] The rating is not itself a rate, but it is used in conjunction with a "class tariff" to determine the applicable transportation charge.[2]

The Department of Defense filed a protest and requested that the Commission suspend the operation of the proposed schedules under Section 216(g) of the Interstate Commerce Act, 49 U.S.C. 316(g), on the ground that the classification rating increases would be unjust and unreasonable. Appellant intervened in support of the proposed increases. The Commission thereafter suspended the schedules and

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[1] Among the factors considered, as summarized by the Commission in this case, are: "weight per cubic foot, and value per pound; liability to loss, damage or theft in transit; likelihood of injury to other freight with which it may come in contact; kind of container or package as bearing upon liability or risk; expense of, and care in handling; ratings on analogous articles; fair relation of ratings as between all articles; and competition between articles of different descriptions but largely used for similar purposes" (J.S. App. D11). See *All States Freight, Inc.* v. *New York, New Haven & Hartford R.R.*, 379 U.S. 343, 345, n.2.

[2] A "class tariff" lists rates for classes of commodities. Commodities with the same classification rating (*i.e.*, in the same "class") have identical transportation rates for shipments of equal weight between the same two points. Rates in a class tariff apply only in the absence of commodity rates or other specific rates.



instituted an investigation into the lawfulness of the proposed increases.

The Commission subsequently determined, with one exception not pertinent here, that the increases with respect to LTL shipments were just and reasonable and accordingly should be allowed to take effect (J.S. App. E). The Commission found[3] that the existing classification ratings for passenger automobiles had been adopted from the analogous railroad classification ratings in 1936 "without specific evaluation of the transportation characteristics of the commodity" (J.S. App. D4). "In view of limitations upon the capacity of motor-carrier equipment," however, "railroad classification ratings may be unsuitable as applied to transportation by motor vehicle" (*id.* at D11). After a thorough analysis of the evidence concerning the motor carrier transportation characteristics of passenger automobiles (*id.* at D5-D6, D12-D14)—with particular focus upon "the low density characteristics of uncrated automobiles" (*id.* at D12), the "unusual difficulties" involved in "the handling and stowing of automobiles" (*id.* at D13), and the "unusual damage risks" associated with transporting uncrated vehicles (*id.* at D14)—the Commission concluded that "the proposed LTL rating [increase] is warranted under the provisions of the Interstate Commerce Act" (*ibid.*).

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[3] The Commission's findings are contained in the hearing examiner's recommended report and order (J.S. App. D), which was affirmed and adopted by a Commission review board and subsequently by Division 2 of the Commission, acting as an appellate division (see J.S. App. E1).

The Commission also gave extensive consideration to certain cost data submitted by the Department of Defense purporting to reflect the average costs per shipment involved in 219 LTL shipments of passenger automobiles by the Defense Department in three specified territories between 1966 and 1970 (see *id.* at D6-D7). The Department contended on the basis of the cost data that "no need ha[d] been shown for increased ratings" (*id.* at D8). Although the Commission noted that it "has generally held that cost considerations are entitled to little weight in proceedings involving class ratings for specific commodities" (*id.* at D9), it thoroughly evaluated the cost evidence submitted and discounted its probative value in this proceeding because of several specified "deficiencies" (*ibid.*).[4]

2. The United States thereafter filed an action in the United States District Court for the District of Columbia seeking to set aside, annul, or suspend the

[4] The Defense Department's *regional* data did not, in the Commission's judgment, support the Department's contentions with respect to the proposed *nationwide* rating increase. "There is no showing as to the proportion of the total traffic, or even of government passenger vehicle shipments, nor does it appear that such regional average costs accurately reflect the unusual circumstances and characteristics of the considered automobile traffic" (J.S. App. D8). In addition, the Department's "cost data does not reflect current cost levels"; "1968 costs are compared with revenue figures based on averages of class rates, some of which were in effect at different periods as late as the middle of 1970" (*ibid.*). The Department's computations consequently "tend to overstate the ratio of revenues to cost under both the present and proposed classification basis" (*ibid.*).



Commission's final order insofar as it allowed the LTL classification rating increase to take effect. A three-judge court was convened pursuant to 28 U.S.C. (1970 ed.) 2325.[5]

The district court suspended the Commission's order and remanded the case to the Commission for further proceedings (J.S. App. A). The court held that, although "[p]laintiff's cost evidence * * * was not entitled to controlling weight in the classification proceeding, * * * the minimal significance attached to this data by the ICC was erroneous" (J.S. App. A7). The court recognized that "[c]lassification proceedings have historically dealt primarily with the qualities and characteristics of commodities, and have accorded little weight to cost and revenue matters" (*id.* at A5-A6); it acknowledged that "[t]here is support for this approach in the statute's legislative history" (*id.* at A6). The court nevertheless formulated a new standard: "In classification proceedings, * * * cost and revenue data cannot be denied proportionate consideration when a substantial issue of cost and revenue is raised"—*i.e.*, "when a claim is raised, with substantiation, that an existing classification suffices to assure a fair, compensatory return to carriers" (*id.* at A11).

Turning to the record in this case, the court found, contrary to the Commission's express findings (see

[5] The three-judge court review procedure was eliminated by Public Law 93-584, 88 Stat. 1918. Review of Commission orders is now within the jurisdiction of the courts of appeals pursuant to 28 U.S.C. (Supp. V) 2341, 2342.

note 4, *supra*), that the cost data submitted by the Defense Department constituted a "*prima facie* valid sampling of nationwide, representative traffic" and "was essentially contemporaneous with the shipments studied" (*id.* at A8). Whereas the Commission considered the cost evidence seriously deficient, the court found that the evidence "made a *prima facie* showing that the existing classification produced a fair return to carriers" (*ibid.*). The court also disagreed with the Commission's assessment of the evidence concerning the motor carrier transportation characteristics of passenger automobiles (*id.* at A9). The court remanded the case to the Commission "for the development and consideration of cost evidence relating to the classification increase" (*id.* at A11).

## ARGUMENT

Appellant's jurisdictional statement presents two questions: (1) whether the district court erred in requiring the Commission to give "proportionate consideration" to cost and revenue data in this classification proceeding; (2) whether the court exceeded the proper scope of its reviewing authority by reweighing the evidence before the Commission and substituting its judgment for that of the Commission as to its probative value. Although we generally support appellant's position on the merits with respect to both issues, we do not believe that plenary review is required with respect to either. In the case of the second issue, however, we think the district court's error was plain, and we accordingly urge that its



judgment be reversed summarily. See *Ralston Purina Co.* v. *Louisville & N. R. Co.*, No. 75-1015, decided June 14, 1976.

1. Although the Commission disagrees with the district court's newly formulated standard for the consideration of cost and revenue data in classification proceedings, it believes that the decision need not significantly interfere with its administration of the Interstate Commerce Act. The district court held only that the Commission must give "proportionate consideration" to cost and revenue data "when a substantial issue of cost and revenue is raised" (J.S. App. A11). Cost considerations are taken into account even in the transportation characteristics that have traditionally determined a commodity's classification rating (see note 1, *supra*). Accordingly, while we do not agree with the district court's new formulation, the decision appears to require no more than that the Commission give *explicit* consideration to cost data in classification proceedings, and only when a "substantial" cost issue is raised independently of the traditional considerations.

That result, no matter how erroneous it may be from a conceptual standpoint (see J.S. 6-14), does not appear likely, in the Commission's judgment, substantially to affect the Commission's disposition of classification proceedings.[6] For that reason, we

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[6] Nor will the district court's standard necessarily affect the result in this proceeding. The court remanded the case to the Commission "for the development and consideration of cost evidence relating to the classification increase" (J.S.

do not believe the issue requires plenary consideration in this case.

2. As appellant's jurisdictional statement demonstrates (J.S. 14-16), the district court overstepped the proper bounds of its reviewing authority by substituting its own assessment of the evidence for that of the Commission. The Commission thoroughly considered the cost evidence that was tendered by the Department of Defense and, for reasons fully spelled out in its report, concluded that the evidence did not have substantial probative value (J.S. App. D7-D8). It reached that conclusion independently of its traditional rule that cost considerations are entitled to little weight in classification proceedings (see *id.* at D9).

The district court, while purporting to set aside the Commission's order for "failure to evaluate adequately" the cost and revenue data in the record (J.S. App. A11), in fact simply reexamined the evidence that the Commission found deficient and reached a different conclusion as to the probative weight that should be accorded to it. The Commission discounted the Defense Department's cost data essentially (in the district court's words) for its "lack of typicality and currency" (J.S. App. A7). The district court disagreed; in its judgment the data were sufficiently typical and current to be ac-

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App. A11). The Commission remains free on remand to find again, in light of all the evidence submitted, including the cost evidence, that the classification rating increase at issue here is just and reasonable.



corded substantial, even *prima facie*, weight (*id.* at A7-A8).

It is well-established, however, that the weighing of evidence is a task for the Commission, not the reviewing court. *Ralston Purina Co.* v. *Louisville & N. R. Co.*, *supra*; *Illinois C. R. Co.* v. *Norfolk & W. R. Co.*, 385 U.S. 57, 69; *Alton R. Co.* v. *United States*, 315 U.S. 15, 23-24. Here, as in *Ralston Purina*, "[t]he District Court exceeded its function in reweighing the testimony" (slip op. 2).

Although an issue of this sort, essentially limited to the facts of this case, is not, in our view, sufficiently important to warrant plenary resolution by this Court, the case is here on appeal, and we believe the district court's judgment is plainly incorrect. We therefore urge here, as we did in *Ralston Purina*, that the district court's judgment be reversed summarily.

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 227447 43

No. 76-778

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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NATIONAL CLASSIFICATION COMMITTEE, APPELLANT

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## MOTION OF THE UNITED STATES TO AFFIRM

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DANIEL M. FRIEDMAN,
*Acting Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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**MOTION OF THE UNITED STATES TO AFFIRM**

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves to affirm the judgment of the district court.

## STATEMENT

This is an appeal from an order of a three-judge district court setting aside a reclassification by the Interstate Commerce Commission of less-than-truckload shipments of passenger automobiles and remanding to the Commission "for the development and consideration of cost evidence relating to the classification increase" (J.S. App., p. A-11).

The background of this litigation was lucidly stated by the district court (J.S. App., pp. A-2 to A-4; footnotes omitted):

Classification is the process of assigning numerical ratings to commodities in an attempt to portray their transportation characteristics. The ratings are expressed as percentages of certain established first class rates. Various factors relating to a commodity are considered, such as density, value, susceptibility to damage, difficulty or care involved in handling, stowability, value of service, and trade competitive conditions. The cost of shipping a particular article may be determined from its weight, its classification rating and the existing tariff or rate. Thus, although they are distinct elements, both classification and rate play a part in establishing the ultimate cost of shipping a commodity.

Since 1936, when the motor carrier industry adopted its classification system wholesale from railroad provisions, the classification applicable to passenger automobiles has remained unchanged. In the late 1960's, as a revenue-producing measure, certain motor carrier tariff associations permitted classification exceptions for automobiles which resulted in higher charges than under published ratings. This prompted a series of claims and legal actions for reparations against individual motor carriers. The carriers thereupon petitioned the National Classification Board, which, after investigation and notice, proposed an increase in classification from 150 to 250 for less-than-truckload (LTL) shipments of passenger automobiles. The proposed schedules, however, were suspended following a protest by the Department of Defense, a major shipper of jeeps, military vehicles, and decedents' automobiles. *See* 37 U.S.C. §554(a)(b) (statute as amended in 1965 to permit shipment of automobiles of deceased Vietnam servicemen at public expense).



Following suspension of the proposed classification schedules, the Commission undertook an investigation to determine whether the schedules were just and reasonable under Section 216(g) of the Interstate Commerce Act, 49 Stat. 543, 559, as amended, 49 U.S.C. 316(g). In the administrative proceedings relating to that investigation, the Department of Defense introduced cost data designed to show that under the existing classification schedules the motor carriers earned a fair return on LTL shipments of passenger automobiles and "that the proposed classification increase would result in revenues far in excess of those considered necessary by the ICC to produce a reasonable return for carriers" (J.S. App., p. A-7). Appellant National Classification Committee intervened and objected to that evidence on the ground that cost considerations are "totally irrelevant in classification proceedings" (*id.* at A-7 n. 7).

The Hearing Examiner admitted the cost data into evidence but concluded that that evidence had "little probative value" (J.S. App., p. D-8).[1] The Hearing Examiner further stated that "although the cost exhibits have been admitted into evidence, it should be

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[1]The evidence submitted by the Department of Defense, based on a study of 219 LTL shipments of passenger automobiles in the three areas of the country where such shipments principally occur (the Transcontinental, South-Central, and Southwestern to Eastern Central Territories), consisted of a comparison of the carriers' average cost per shipment with average revenues under both the existing and proposed classifications (J.S. App., pp. D-7 to D-8). The Hearing Examiner believed the evidence to be deficient because it was not of nationwide applicability and because the average cost figures reflected 1968 levels whereas the average revenue figures included consideration of some class rates that were in effect as late as 1970—a disparity that the Hearing Examiner thought "would tend to overstate the ratio of revenues to cost under both the present and proposed classification basis" (J.S. App., p. D-8).

pointed out that the Commission has generally held that cost considerations are entitled to little weight in proceedings involving class ratings for specific commodities" (J.S. App., p. D-9). The Hearing Examiner then determined that the proposed reclassification was lawful under Section 216(g) and should be allowed to take effect (J.S. App., p. D-17). The Commission affirmed and adopted the decision and order of the Hearing Examiner (J.S. App., p. E-1).

The United States sought review of that decision in the United States District Court for the District of Columbia pursuant to 28 U.S.C. 2321-2325.[2] The court rejected "[d]efendants['] argu[ment] that cost data is not entitled to probative weight in classification proceedings" (J.S. App., p. A-4), holding that "[t]o prevent arbitrary or unreasonable classifications, the ICC * * * cannot ignore cost and revenue data when a claim is raised, with substantiation, that an existing classification suffices to assure a fair, compensatory return to carriers" (*id.* at A-11). The court determined that cost and revenue data must be given "proportional * * * consideration" (*ibid.*), and that under that standard "the minimal significance attached to this data by the ICC was erroneous" (*id.* at A-7). "Finding a failure to evaluate adequately cost and revenue data" (*id.* at A-11), the district court remanded the case "to the ICC for the development and consideration of cost evidence relating to the classification increase" (*ibid.*).

**ARGUMENT**

1. The district court correctly held that cost and revenue data that substantiates a claim that an existing classification

[2]Superseding provisions for the review of the Commission's orders have since been enacted. See Act of January 2, 1975, Pub. L., 93-584, 88 Stat. 1917.



produces a fair return to carriers must be given "proportionate" consideration in classification proceedings. That result is required by the plain language of Section 216(i) of the Interstate Commerce Act, 49 U.S.C. 316(i), which directs the Commission, in prescribing classifications, to give "due consideration" to both cost and revenues:

> In the exercise of its power to prescribe just and reasonable * * * classifications * * * the Commission shall give due consideration among other factors, * * * to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

Appellant seeks to brush this provision aside as a "broad policy declaration[ ]" (J.S. 13), but it offers no reason why that "policy declaration" should not be followed by the Commission. Appellant cannot mean that the broad language of the provision is not reducible to specific, concrete, transportation factors, for the Commission long has isolated specific factors that must be considered in classification proceedings. See *All States Freight* v. *New York, New Haven & Hartford Railroad Co.*, 379 U.S. 343, 345 n. 2. Nor can appellant mean that the statute, broad as it is, does not extend to cost and revenue data, for two of the small number of factors explicitly listed in the statute are "cost" and "revenues".[3]

[3]The Commission acknowledges (Memorandum, p. 7) that "[c]ost considerations are taken into account * * * in the transportation characteristics that have traditionally determined a commodity's

The fundamental purpose of a classification rating is to ensure that each commodity bears its fair share of transportation costs. In giving the Commission authority to classify commodities, Congress was well aware of the interrelationship between classification and rates and of the danger that classification might be used to manipulate rates. As the district court noted (J.S. App., p. A-10):

> The essential point is that classification is not to be an artifice or an "end around" method of increasing revenue—without supporting cost evidence. *Cf. Western Classification Case,* 25 I.C.C. 442, 453 (1912) (classification not an instrumentality for revising rates and charges). As was observed over 60 years ago during debate on legislation providing the ICC with specific classification authority, "[C]lassification of freight is just as important as rates, because by moving a particular article from one class to another you affect the rates." 45 Cong. Rec. 4578 (1910) (statement of Rep. Mann). Congressman Russell further explained this viewpoint:
>
> > "[T]he shipper can be extorted from; he can be made to pay an unjust rate just as well through classification as he can through the fixing of a rate. The carriers can put an article in one classification, subject to a given rate, and if the Interstate Commerce Commission sees fit to declare that rate unreasonable, and reduce it, declaring what shall be a reasonable rate to take its place, the carrying corporation can obtain the same benefit and put the shipper under the same disadvantage by simply changing the classification of the article." *Id.* at 5142, quoted in *All States Freight, supra,* 379 U.S. at 350, 85 S. Ct. 419.

classification ratings." In the Commission's view, the district court's opinion merely requires explicit consideration of factors whose consideration previously had been implicit and accordingly works no change in substance in the Commission's practice (*ibid.*). Thus there is no basis for appellant's bald assertion that the decision below "will have a major effect upon motor common carriers" (J.S. 6) and a "serious impact" on the "general public" (*ibid.*).



The decision below averts the possibility that classification might be used to manipulate rates by requiring the Commission to give "proportionate consideration" to cost and revenue data whenever "a substantial issue of cost and revenue is raised" (J.S. App., p. A-11). This result is required by the language of the governing statute and is supported by the legislative history of the Act.

2. Both appellant (J.S. 14-16) and the Commission (Memorandum, pp. 8-9) assert that the district court exceeded the proper scope of judicial review and impermissibly substituted its judgment for the Commission's in regard to the evidentiary weight to be given to the cost data. We disagree. While it is true that the Commission did consider the evidence and criticized its probative value, the Commission also stated (J.S. App., p. D-9) that "cost considerations are entitled to little weight" in classification proceedings. This bias against cost data, as we have shown, represented legal error by the Commission, and it is impossible to determine from the Commission's decision whether the data would have been accorded more weight, notwithstanding the deficiencies perceived by the Commission, had it been evaluated free of the improper influence of that bias. The district court's judgment (J.S. App. B) suspending the Com-

mission's order and remanding for reconsideration of that evidence under the proper legal standard was therefore correct.[4]

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.*

MARCH 1977.

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[4]On the face of it, the district court's determination that the cost data made a *prima facie* showing that the existing classification provided compensatory rates to the carriers appears to differ from the Commission's view that the data had little probative value. But that part of the court's opinion, read in context, constitutes a determination, once the court had decided that substantiated claims pertaining to costs and revenues require consideration, that the cost data in this case met the threshold test of substantiation. In contrast to *Ralston Purina Co.* v. *Louisville & N. R. Co.*, 426 U.S. 476, where the lower court reweighed the conflicting evidence, set aside and annulled the Commission's order, and refused to remand for reconsideration, in this case the court did not direct the Commission to give any particular weight to the cost evidence but simply ordered the Commission to consider it without any presumptive prejudice against it. Indeed, the Commission itself has recognized that it "remains free on remand to find again, in light of all the evidence submitted, including the cost evidence, that the classification rating increase at issue here is just and reasonable" (Memorandum, pp. 7-8 n. 6). Since the district court's final disposition was correct, there is no reason for this Court to undertake plenary review merely in order to consider whether the language of the district court's opinion, taken out of context, might be regarded as evidence of a tendency to "overstep[ ] the proper bounds of its reviewing authority by substituting its own assessment of the evidence for that of the Commission" (*id.* at 8).